DOCKET

No. 08-974

Title: Arthur L. Lewis, Jr., et al., Petitioners
v.
City of Chicago, Illinois

Docketed: February 3, 2009
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (07-2052)
Decision Date: June 4, 2008
Rehearing Denied: August 21, 2008
Questions Presented

Date	Proceedings and Orders
Nov 3 2008	Application (08A404) to extend the time to file a petition for a writ of certiorari from November 19, 2008 to January 18, 2009, submitted to Justice Stevens.
Nov 5 2008	Application (08A404) granted by Justice Stevens extending the time to file until January 18, 2009.
Jan 21 2009	Petition for a writ of certiorari filed. (Response due March 5, 2009)
Mar 5 2009	Order extending time to file response to petition to and including April 10, 2009.
Apr 10 2009	Brief of respondent City of Chicago in opposition filed.
Apr 20 2009	Reply of petitioners Arthur L. Lewis, Jr., et al. filed. (Distributed)
Apr 21 2009	DISTRIBUTED for Conference of May 14, 2009.
May 18 2009	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Aug 21 2009	Brief amicus curiae of United States filed.
Sep 2 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 2 2009	Supplemental brief of respondent City of Chicago filed. (Distributed)
Sep 30 2009	Petition GRANTED.
Nov 6 2009	Blanket consent to the filing of amicus briefs , in support of either party and of neither party, received from counsel for the petitioners and counsel for the respondents.
Nov 13 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including November 23, 2009.
Nov 13 2009	The time within which to file respondent's brief on the merits is extended to and including January 15, 2010.
Nov 23 2009	Joint appendix filed (statement of costs received).
Nov 23 2009	Brief of petitioners Arthur L. Lewis, Jr., et al. filed.
Nov 30 2009	SET FOR ARGUMENT ON Monday, February 22, 2010.
Nov 30 2009	Brief amicus curiae of United States filed.
Nov 30 2009	Brief amici curiae of National Partnership for Women & Families, et al. filed.
Nov 30 2009	Brief amici curiae of International Association of Official Human Rights Agencies filed.
Dec 17 2009	CIRCULATED.
Dec 30 2009	Record for U.S.C.A. for 7th Circuit is electronic.
Jan 15 2010	Brief of respondent City of Chicago, Illinois filed. (Distributed)
Jan 19 2010	Record from U.S.D.C. for Northern District of Illinois. (3 boxes)
Jan 21 2010	Brief amicus curiae of Pacific Legal Foundation filed. (Distributed)

Jan 21 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 22 2010	Brief amici curiae of Equal Employment Advisory Council, et al. filed. (Distributed)
Jan 22 2010	Brief amici curiae of City of New York, et al. filed. (Distributed)
Feb 5 2010	Reply of petitioners Arthur L. Lewis, Jr., et al. filed. (Distributed)
Feb 19 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 22 2010	Argued. For petitioners: John A. Payton, New York, N. Y.; and Neal K. Katyal, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Benna Ruth Solomon Deputy Corporation Counsel, Chicago, Ill.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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No. 08-____

IN THE
Supreme Court of the United States

ARTHUR L. LEWIS, JR., *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals for the
Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Title VII, a plaintiff seeking to bring suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice occurred. Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the announcement of the practice, or may a plaintiff file a charge within 300 days after the employer's use of the discriminatory practice?

PARTIES TO THE PROCEEDINGS

The petitioners are Arthur L. Lewis, Jr., Gregory S. Foster, Jr., Arthur C. Charleston III, Pamela B. Adams, William R. Muzzall, Philippe H. Victor, Crawford M. Smith, Aldron R. Reed, and the African American Fire Fighters League of Chicago, Inc., all of whom were plaintiffs and appellees in the courts below. The African American Fire Fighters League of Chicago, Inc., is a not-for-profit corporation which has not issued stock and has no corporate parent.

The respondent is the City of Chicago, which was the defendant and appellant in the courts below.

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Petitioners Arthur L. Lewis, Jr., *et al.* respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing the judgment of the district court, is reported at 528 F.3d 488 (7th Cir. 2008), and is reproduced at App. 1a-11a. The opinion of the United States District Court for the Northern District of Illinois, finding liability under Title VII against respondent City of Chicago, is unreported and is reproduced at App. 12a-43a. The opinion of the district court finding that petitioners' EEOC charges were timely is unreported and is reproduced at App. 44a-70a.

JURISDICTION

The court of appeals entered its judgment on June 4, 2008. Petitioners filed a timely petition for rehearing *en banc* on July 3, 2008, which the court of appeals denied on August 21, 2008. *See* App. 71a. On November 5, 2008, this Court extended the time for filing a petition for a writ of certiorari by sixty days. Order on Application No. 08A404; *see also* Sup. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides:

> (a) It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Section 703(k)(1)(A) of Title VII provides:

> (k) Burden of proof in disparate impact cases
>
> (1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if –
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .

42 U.S.C. § 2000e-2(k).

Section 706(e)(1) of Title VII provides in pertinent part: "A charge under this section shall be filed . . . within three hundred days after the alleged

unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).

STATEMENT OF THE CASE

The district court found that respondent City of Chicago discriminated against petitioners, who were African American applicants for entry-level firefighter positions, by using a hiring practice that had a disparate impact on African American applicants and bore no demonstrable relationship to determining firefighter performance. The court of appeals, however, reversed on timeliness grounds, holding – contrary to the law of five circuits – that an EEOC charge for disparate impact discrimination must be filed within 300 days of the announcement of the practice. Under this rule, any subsequent challenge to an employer's use of the practice as the basis for employment decisions is time-barred.

In the opinion below, the Seventh Circuit asserted that two other circuits (the Third and Sixth Circuits) agree with this approach. By contrast, at least five circuits (the Second, Fifth, Ninth, Eleventh, and D.C. Circuits) disagree; under their precedents, making employment-related decisions from a tainted system is an act of discrimination distinct from the original implementation of the system, such that new claims accrue each time the tainted system is used to make those decisions. The split in the circuits is clear and well-established, and not only was acknowledged by the Seventh Circuit in this case, but also has been recognized by other federal courts, leading commentators, and the respondent itself.

This Court should grant this petition for a writ of certiorari to resolve the well-established split in the

circuit courts, and to establish uniformity among the lower courts on this important question affecting millions of employees and employers nationwide.

A. The Statutory Framework.

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice" for an employer:

> (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Both "disparate treatment" claims (which challenge intentionally discriminatory employment practices) and "disparate impact" claims (which challenge employment practices that have an adverse effect on protected classes regardless of intent) are cognizable under Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."); *see also* 42 U.S.C. § 2000e-2(k).

Disparate impact discrimination is established if a "complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged practice is job related . . . and consistent

with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A). Any person subject to such a practice must file a charge of discrimination with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).[1] If after investigating the charge, the EEOC cannot secure voluntary compliance from the employer and the EEOC elects not to file suit on behalf of the employee,[2] the employee can receive a "right-to-sue" letter and institute a civil action against the employer. 42 U.S.C. § 2000e-5(f)(1). The employee has ninety days from receipt of a right-to-sue letter to file suit. *Id.*

B. Proceedings in the District Court.

In 1995, the City of Chicago administered a scored test to over 26,000 applicants as the first step in its hiring process for entry-level firefighters. After the test was scored, the City divided the applicants into three categories based on whether their scores fell above or below specified minimums, and labeled these categories "well qualified," "qualified," and "not qualified." The City's use of the test scores to rank applicants in this manner had a severe disparate impact upon African American applicants: white test-takers were five times more

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[1] In certain circumstances not present here, the limitations period is 180 days. *See* 42 U.S.C. § 2000e-5(e)(1).

[2] With respect to charges that involve private employers, the EEOC has the authority to initiate civil litigation, and with respect to charges that involve a government, governmental agency, or political subdivision as the employer, the EEOC refers the case to the Attorney General who then has discretion to initiate civil litigation. *See* 42 U.S.C. § 2000e-5(f)(1).

likely than African American test-takers to be ranked "well qualified." Petitioners are a class of approximately 6,000 African Americans who took the 1995 test and were rated "qualified."

In January 1996, the City mailed notices of the test results to all applicants, advising them of the creation of the three categories and of the City's plan to advance only those in the "well qualified" category to the next steps of the hiring process. In May 1996, five months after announcing its plan to make hiring selections from the disproportionately white pool of test-takers in the "well qualified" group, the City began using that method to hire its first class of firefighters from the pool of applicants who took the 1995 test. During the next five years (with limited exceptions not relevant here), the City used this method nine more times to fill subsequent firefighter classes, each time selecting a new class at random from the "well qualified" group. The result was that between 1996 and 2001, the City's entry-level firefighter hires were 77% white and 9% black (compared to an applicant pool that was 45% white and 36% black). In each of these ten rounds of hiring, applicants in the pool of test-takers ranked "qualified," including petitioners, were denied consideration for hire.

Petitioners filed EEOC charges of race discrimination in March 1997, within 300 days after the City's hiring of a new class for which petitioners and others in the "qualified" group were denied consideration, but more than 300 days after the City's initial announcement of the test results in January 1996. After receiving right-to-sue letters from the EEOC, petitioners filed this lawsuit in

1998. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

In the district court, the City moved for summary judgment on the ground that petitioners' EEOC charges were untimely. The City argued that the only alleged act of discrimination occurred in January 1996, when petitioners were notified that they were placed in the "qualified" category rather than the "well qualified" category. The district court denied the motion, holding that an employer's use of a discriminatory hiring practice is an actionable Title VII violation that starts its own charge-filing period. App. 69a-70a. Because petitioners' EEOC charges were filed within 300 days of the City's use of the test results to make hiring decisions, the district court held that those charges were timely. The district court recognized that the circuits were split on this question, and agreed with the reasoning of the Second and Fifth Circuits while declining to follow the Third Circuit. App. 61a-62a, 67a-69a (citing *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980); and *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980); and declining to follow *Bronze Shields, Inc. v. N.J. Dep't of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981)).

The case proceeded to a bench trial, at which the City admitted that the hiring practice in question had a severe disparate impact on African American candidates, but argued that the practice did not violate Title VII because it was job related and consistent with business necessity. The district court rejected this defense, holding in March 2005 that the City's firefighter hiring practice unlawfully discriminated against African American applicants in viola-

tion of Title VII.[3] The court later resolved remedial issues and entered final judgment.

C. Proceedings in the Court of Appeals.

On appeal, the City did not challenge the district court's finding of unlawful race discrimination, and instead argued only that petitioners had not timely filed their EEOC charges. Br. of Def.-Appellant at 4, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Oct. 5, 2007). The Seventh Circuit agreed and, in an opinion by Judge Richard Posner, reversed the district court's judgment.

The Seventh Circuit held that discrimination against petitioners "was complete when the tests were scored and . . . was discovered when the applicants learned the results." App. 4a. Because petitioners had filed EEOC charges within 300 days of the City's use of the hiring list, but more than 300 days after initial notification of the test results, the court of appeals concluded that the EEOC charges were untimely.

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[3] Specifically, the district court held that the test was skewed toward the "least important aspects of the firefighter position at the expense of more important abilities," App. 32a, and that the cut-off score selected by the City for dividing the "well qualified" from the "qualified" pool was a "statistically meaningless benchmark." App. 34a. The court found that there was no evidence that those in the disproportionately white "well qualified" pool "are the most qualified candidates for the job or that they are better qualified than individuals" in the "qualified" pool. App. 36a. The district court further found that the City set the cut-off score for dividing among the "well qualified" and "qualified" pools not for business necessity but for administrative convenience, against the advice of the test developer. App. 34a-35a.

The court of appeals acknowledged that if the City's hiring practice had been discriminatory on its face, each use of the practice after adoption would have been unlawful, because such use would have been intentional discrimination. App. 4a-5a. But the court concluded that in a disparate impact case, once testing is done and applicants are sorted into facially neutral categories such as "well qualified" and "qualified," no further discrimination occurs by giving preference in actual hiring decisions to those in one category rather than another. App. 4a-7a.

The Seventh Circuit acknowledged the split of authority among the courts of appeals, and cited the Third and Sixth Circuits favorably while disagreeing with the Ninth Circuit. App. 6a-7a (citing *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000); and *Bronze Shields*; and disagreeing with *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991)).

Petitioners filed a petition for rehearing *en banc* on July 3, 2008, noting the Seventh Circuit's departure from the rule applied in other courts of appeals. The Seventh Circuit denied rehearing on August 21, 2008. App. 71a. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

The courts of appeals are intractably divided over the proper analysis and resolution of claim-accrual questions in disparate impact cases. Some courts hold that a challenge to an employment practice with a discriminatory adverse impact is timely if filed within the charge-filing period after any use of the practice that adversely affects the charging party. Other decisions hold that a challenge is timely *only* if charges are filed within the charge-

filing period after the charging party learns of the adoption of the employment practice in question, even if the practice is not immediately used to make employment decisions and is then used repeatedly for this purpose over a lengthy period of time.

This legal distinction is of enormous practical importance, effectively determining whether an employer may indefinitely follow a discriminatory employment practice if affected employees or applicants fail to object to the initial promulgation of the procedure within the brief Title VII limitations period. The use of employment practices such as the hiring procedure at issue here is widespread – and is in fact required by state or local law for many public employers across the country – making the need for a nationally uniform claim-accrual rule paramount.

I. There is an Acknowledged Division Among the Courts of Appeals Regarding the Question Presented.

This Court should grant the petition for a writ of certiorari to resolve an important question that has long divided the courts of appeals. The division of authority on the question presented – whether an EEOC charge for disparate impact discrimination must be filed within the charge-filing period after the adverse impact of an employment practice is first announced, or whether charges are timely if filed within the time period after any subsequent use of that practice – was acknowledged by the Seventh Circuit and district court below. App. 6a-7a, 61a-62a, 67a-69a. This division of authority has previously been noted by the Third, Fifth, and Sixth Cir-

cuits, and leading commentators likewise agree that the courts of appeals are in conflict.

Five circuits – the Second, Fifth, Ninth, Eleventh, and D.C. Circuits – have held that each instance of a repeated refusal to hire, promote, or provide employment benefits, based on a facially neutral policy that has a disparate impact on a protected group and that is not job related and consistent with business necessity, constitutes an independent violation of Title VII. *See Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232, 248-50 (2d Cir. 1980), *aff'd on other grounds*, 463 U.S. 582 (1983); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1980); *Bouman v. Block*, 940 F.2d 1211, 1220-21 (9th Cir. 1991); *Beavers v. Am. Cast Iron Pipe Co.*, 975 F.2d 792, 797-800 (11th Cir. 1992); *Anderson v. Zubieta*, 180 F.3d 329, 335-37 (D.C. Cir. 1999). This rule provides plaintiffs with a new limitations period that commences with each subsequent refusal to hire (or other adverse employment action) caused by the application of the policy.

Contrary to the holdings of these five circuits, the Seventh Circuit held in this case that petitioners' disparate impact claims accrued only when they were told the results of the City's discriminatory hiring practice. App. 4a-5a. The Seventh Circuit cited the decisions of the Third and Sixth Circuits as being in accord. App. 6a (citing *Bronze Shields, Inc. v. N.J. Dep't of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981) and *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000)). The rule in these courts requires plaintiffs to file EEOC charges within the short limitations period after the adverse impact of an employment practice is first announced, or else lose permanently

the ability to challenge employment decisions resulting from the subsequent use of that practice.

The respondent "readily acknowledged" this split of authority in its briefs below and at oral argument, albeit without recognizing the full depth of the split. Reply Br. of Def.-Appellant at 12, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Jan. 25, 2008). ("While we readily acknowledge that the Second and Fifth Circuits have applied the continuing violation doctrine to the ongoing use of facially neutral lists with disparate impact, the Sixth Circuit, like the Third, has refused." (citations omitted)).[4]

1. The majority position in the courts of appeals is to treat EEOC charges regarding disparate impact discrimination in an employer's selection, pay, or benefits practices as timely if filed within the limitations period after any use of that practice.

In *Bouman*, the Ninth Circuit considered a Title VII challenge to a promotional exam that allegedly had a disparate impact on women. *Bouman*, 940 F.2d at 1217-18. Much like the instant case, the plaintiff was told when the eligibility list was created that she was not likely to be reached for promo-

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[4] *See also* Br. of Def.-Appellant at 36, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Oct. 5, 2007) ("Other Circuits have split in cases with similar facts to those here. The Third and Sixth Circuits refuse to extend the accrual of claims based on the ongoing use of eligibility lists, while the Second and Fifth Circuits regard it as a continuing violation." (citations omitted)); Transcript of Oral Argument at 1, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Feb. 22, 2008) ("While this Court has not addressed this precise issue, the time to challenge a tainted eligibility list has been litigated in four other circuits, which have split two to two.").

tion. *See id.* at 1217. Noting that "[t]he crucial issue in this case is whether [the plaintiff's] non-appointment from the eligible list was a separate injury from the allegedly discriminatory examination itself," the Ninth Circuit concluded that it was, and that the plaintiff's EEOC charge – filed within 300 days of the expiration of the eligibility list – was timely. *Id.* at 1220-21. The Seventh Circuit below recognized that "[t]he Ninth Circuit reached a contrary result in *Bouman v. Block*," but declared *Bouman*'s rationale mistaken. App. 6a-7a.

The Second Circuit is in agreement with the position of the Ninth Circuit. In *Guardians*, the Second Circuit addressed the timeliness of the plaintiffs' charges alleging that an exam for police hiring had a disparate impact on black and Hispanic applicants. *Guardians*, 633 F.2d at 235-36. The plaintiffs filed EEOC charges several years after creation of the eligibility list but within 300 days of the defendant's last use of that list.[5] *See id.* The Second Circuit held that the charges were timely because "the results of the test were in effect being 'used to discriminate'" in violation of Title VII "each time a member of the plaintiff class was denied a chance to fill a vacancy." *Id.* at 249; *see also id.* at 250 ("[A]n unjustified refusal to hire is in itself a violation which cannot be dismissed as a mere effect of an earlier wrong."). The Sixth and Third Circuits (which the Seventh Circuit viewed as being in accord with it) themselves recognize a conflict between their po-

[5] Although the plaintiffs in *Guardians* alleged a discriminatory refusal to hire minority applicants, the case arose as a challenge to the defendant's last-hired, first-fired layoff policy. *See Guardians*, 633 F.2d at 235-36.

sitions and the Second Circuit's holding in *Guardians*. *See Cox*, 230 F.3d at 204 ("In contrast to the Third Circuit, the Second Circuit treats hiring from an allegedly tainted roster as an act of discrimination distinct from the original acts of discrimination."); *see also Bishop v. New Jersey*, 144 F. App'x 236, 239 (3d Cir. 2005) (unpublished) (relying on *Bronze Shields* and *Cox*, and noting that the Second Circuit's decision in *Guardians* is to the contrary).

The Fifth Circuit has also addressed the same question and has reached the same conclusion as the Ninth and Second Circuits. In *Gonzalez*, the court held that the plaintiff's disparate impact challenge would be timely filed if the plaintiff could show that the defendant "denied him a promotion or transfer within the 180-day period on the basis of the prior testing."[6] *Gonzalez*, 610 F.2d at 249. The court remanded for determination of the fact question whether the defendant "continued to base its selection of employees to receive job opportunities upon scores from an unvalidated battery of tests." *Id.*

Two other circuits have addressed the same question in the context of disparate impact claims arising from the adoption and repeated application of employment benefit policies. The Eleventh and D.C. Circuits have each held that every instance of a repeated refusal to provide employment benefits, based on a facially neutral policy that violates Title VII, constitutes an independent act of discrimination

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[6] The Fifth Circuit subsequently noted the apparent split in authority on this point. *See Walls v. Miss. State Dep't of Pub. Welfare*, 730 F.2d 306, 319 (5th Cir. 1984) (noting the conflict between *Guardians* and *Bronze Shields*).

and restarts the clock for filing an EEOC charge. *See Beavers*, 975 F.2d at 794, 797-800 (upholding the timeliness of a plaintiff's challenge to his employer's policy of refusing health care coverage for children who did not reside with the parent-employee, where the plaintiff filed his EEOC charge eight years after his children's benefits were first denied, because the employer had continued to apply the policy within the filing period preceding the plaintiff's EEOC charge)[7]; *Anderson*, 180 F.3d at 333, 335-37 (holding that the plaintiffs' discrimination challenge to the adverse impact of their employer's pay and benefits policies was timely, even though the plaintiffs did not file EEOC charges within the charge-filing period after notice that the policies would apply to them, because each application of the benefits policies was an actionable Title VII violation).

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[7] The Seventh Circuit sought to distinguish *Beavers* by asserting that the discriminatory practice at issue – affording benefits to an employee's children only if the employee was their custodial parent – was the "sole cause of the denial" of benefits to the plaintiff's children, while in this case there was an "intervening neutral act"– the City's decision to hire only those whose scores placed them in the group labeled "well qualified." App. 5a. In fact, however, what the Seventh Circuit characterized as an "intervening neutral act" was an integral part of the practice as originally adopted by the City: filling firefighter vacancies by classifying the test scores into groups and preferentially hiring from the purportedly "higher" group. Hence, in both *Beavers* and this case, a single practice was originally adopted that would have a predictable disparate impact on a protected group, and that practice was subsequently *used* over a lengthy period to make decisions that disparately affected that group. In *Beavers*, the Eleventh Circuit held that the continuing use of such a practice started new charge-filing periods; in the present case, the Seventh Circuit held that it did not.

2. The Seventh Circuit departed from the rule applied in the five courts of appeals cited above, holding here that disparate impact charges must be filed within the limitations period after the initial announcement of the challenged practice. App. 4a-7a. The court recognized the split of authority on this point, citing the Third Circuit's decision in *Bronze Shields* and the Sixth Circuit's decision in *Cox* in support of its holding. App. 6a.

In *Bronze Shields*, a disparate impact challenge to a civil service test, the Third Circuit indicated that only the initial administration of the test, and not its subsequent use to refuse to hire minority applicants, could be a disparate impact violation.[8] *See Bronze Shields*, 667 F.2d at 1081-84. Similarly, in *Cox*, the Sixth Circuit held that EEOC charges alleging intentional racial discrimination associated with the use of a police department promotional exam were not timely because they were filed outside the charge-filing period after the promulgation of the eligibility list. *See Cox*, 230 F.3d at 201-04.

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[8] *Bronze Shields* arguably left open the question whether an applicant who does not fail an employment test, but remains on a ranked list throughout the time the list is in use, can challenge each use of the list as a new violation. *See Hood v. N.J. Dep't of Civil Serv.*, 680 F.2d 955, 958-59 (3d Cir. 1982); *cf. EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 219 (3d Cir. 1983). However, two recent unpublished decisions in the Third Circuit have applied *Bronze Shields* to hold that "otherwise neutral use of an allegedly tainted exam is not itself a discriminatory act under Title VII, but rather is merely an effect of the prior act of discrimination." *Bishop*, 144 F. App'x at 239; *see also Bishop v. New Jersey*, 84 F. App'x 220, 224-25 (3d Cir. 2004) (unpublished).

In sum, eight courts of appeals have weighed in on the question presented. Five have held that EEOC charges regarding disparate impact discrimination in an employer's selection, pay, or benefits practices are timely if filed within the limitations period after any use of that practice. Three have disagreed, holding that EEOC charges must be filed within the limitations period after the challenged practice is initially adopted and results showing an adverse impact first become known.[9]

Leading employment discrimination commentators have noted the long-established split in the circuits on this point. A prominent treatise notes:

> [W]hen an employer uses the results of a discriminatory test over a period of time as the basis for employment decisions, . . . [m]ust an aggrieved party file a charge within the statutory period running from the date of administration of the test, or is a charge timely if filed while the results are still being used as a basis for employment decisions? The courts are divided on this issue.

Barbara T. Lindemann & Paul Grossman, 2 *Employment Discrimination Law* 1775 & n.134 (4th ed. 2007) (comparing *Guardians* and *Gonzalez* with

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[9] Petitioners argued below that all of the courts of appeals to address this question supported petitioners' position on timeliness, and that the rulings of the Third and Sixth Circuits could be distinguished based on the specific facts of those cases. *See* Br. of Pls.-Appellees at 33-35, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Dec. 14, 2007). Regardless how the decisions of the Third and Sixth Circuits are counted, the Seventh Circuit's decision below is in conflict with the holdings of at least five other courts of appeals.

Bronze Shields); *see also* Lex K. Larson, 4 *Employment Discrimination* § 72.07[7][c] & nn.109-11 (2d ed. 1994 & Supp. 2008) ("If an employee chooses not to bring a timely challenge to the methods used in compiling [an allegedly tainted] eligibility list, should that employee subsequently be able to challenge the failure to grant him or her a promotion? The courts are not of one mind on this question." (citing *Cox*, *Bronze Shields*, *Guardians*, *Gonzalez*, and *Bouman*)).

3. There is nothing to suggest that this widely-recognized split among the circuits will resolve itself without this Court's intervention. The Second Circuit, for example, has maintained its position since the *Guardians* decision in 1980, and has reaffirmed its holding repeatedly since then.[10] The Ninth Circuit, likewise, has recently reaffirmed its *Bouman* ruling. *See Tatreau v. City of Los Angeles*, No. 03-56638, 138 F. App'x 959, 961 (9th Cir. 2005) (unpublished). And the Seventh Circuit was aware of, and explicitly acknowledged, contrary and long-standing

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[10] *See, e.g.*, *Connolly v. McCall*, 254 F.3d 36, 41-42 (2d Cir. 2001) (relying on *Guardians* to hold that the plaintiff's challenge to the New York public pension system was timely); *Harris v. City of New York*, 186 F.3d 243, 248 (2d Cir. 1999) (holding that the plaintiff's failure-to-promote claim did not accrue until the allegedly discriminatory eligibility list expired); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996) (stating that a claim accrues when "there is evidence of an ongoing discriminatory policy or practice, such as use of discriminatory seniority lists or employment tests"); *Ass'n Against Discrimination in Emp't v. City of Bridgeport*, 647 F.2d 256, 274-75 (2d Cir. 1981) (holding that a firefighter test was discriminatory and that employee selections based on that test were independent acts of discrimination).

authority from other circuits in concluding that petitioners' claims were time-barred. App. 6a-7a.

This case presents an ideal vehicle for this Court to resolve the entrenched circuit split. The question presented is a pure question of law unencumbered by any factual disagreement between the parties. The legal question was outcome-determinative in this case, was extensively briefed by the parties,[11] and was clearly decided by the Seventh Circuit.

II. The Question Presented is of Significant Importance to the Administration of Title VII Claims.

This conflict requires resolution by this Court not only because of the intractable split among the courts of appeals, but also because clarity and uniformity regarding the charge-filing deadline are of significant importance to the administration of Title VII claims in the lower courts.

The use of employment tests like the one at issue in this case to make hiring, promotion, or other employment decisions is widespread: "For more than a half-century, employers, employment agencies, apprenticeship committees, and others have used scored tests to assist in making selection decisions for employment opportunities, including hiring, job assignments, training, and promotion." Barbara T. Lindemann & Paul Grossman, 1 *Employment Dis-*

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[11] *See* Br. of Def.-Appellant at 16-41, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Oct. 5, 2007); Br. of Pls.-Appellees at 8-38, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Dec. 14, 2007); Reply Br. of Def.-Appellant at 3-16, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Jan. 25, 2008).

crimination Law 161 (4th ed. 2007). Many public employers and civil service departments, in particular, are required by state law to use scored tests to select among candidates for hiring, promotion, and other job benefits.[12]

As a result, adverse impact lawsuits that challenge alleged disparities caused by these employment practices have been regularly filed for decades.[13] This is an ongoing feature of Title VII litiga-

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[12] At least thirty-four states have constitutional or statutory provisions requiring state agencies or localities to use competitive examinations in making employment decisions for public employees. *See* Ala. Const. art. V, § 138.01(A); Ariz. Rev. Stat. Ann. § 38-1003(3) to (4); Ark. Code Ann. §§ 14-49-304(b)(2), 14-50-304(b)(2), § 14-51-301(b)(2); Cal. Const. art. VII, § 1(b); Colo. Const. art. XII, § 13(1); Conn. Gen. Stat. §§ 5-195, 7-413; Haw. Rev. Stat. §§ 76-1, -18; Idaho Code Ann. § 50-1604; 65 Ill. Comp. Stat. 5/10-1-7; Ind. Code §§ 4-15-2-12 to -15; Iowa Code §§ 341A.8, 400.8, 400.17; Kan. Stat. Ann. §§ 19-4311(a), 75-3746(h); Ky. Rev. Stat. Ann. §§ 67A.270, 90.160, 90.320, 90.350; La. Const. art. X, § 7; Mass. Gen. Laws ch. 31, § 6; Mich. Const. art. XI, § 5; Minn. Stat. §§ 44.06, 387.36(b)(2), 419.06(2), 420.07(2); Mont. Code Ann. §§ 7-3-1258, 7-32-4108, 7-32-4111; Neb. Rev. Stat. §§ 19-1829, 23-2525(3), 23-2541(3); Nev. Rev. Stat. § 284.205; N.J. Const. art. VII, § I, para. 2; N.M. Stat. § 10-9-13(C); N.Y. Const. art. V, § 6; Ohio Const. art. XV, § 10; 71 Pa. Stat. Ann. § 741.501(a); R.I. Gen. Laws §§ 36-4-17 to -18; S.C. Code Ann. §§ 5-19-20, -180; S.D. Codified Laws § 3-7-9, -11; Tenn. Code Ann. § 8-30-201(a); Tex. Loc. Gov't Code Ann. §§ 143.021, 143.025; Utah Code Ann. § 10-3-1007; Wash. Rev. Code §§ 41.08.050, 41.12.05(4); Wis. Stat. §§ 63.25(1)(a), 230.15(1); Wyo. Stat. Ann. § 15-5-106(b).

[13] *See, e.g., Adams v. City of Chicago*, 469 F.3d 609, 610 & n.1 (7th Cir. 2006) (noting that "Chicago's methods for promoting [police] officers . . . has proven to be a contentious issue that has spawned litigation over the past several decades," and citing challenges to police promotions from 1971 to 1998 in eight other lawsuits); *Mems v. City of St. Paul*, 224 F.3d 735, 739-41

tion. In the last several years alone, new disparate impact challenges have been filed to civil service exams used for municipal hiring and promotion in Houston, Texas; New York City; and Lynn, Massachusetts, to give just a few examples.[14]

Nor is the use of scored tests the only form of employment practice that is affected by the circuit split at issue here. Other employment criteria – including, for example, education requirements,[15] physical

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(8th Cir. 2000) (reviewing a disparate impact challenge to St. Paul fire department's promotional exam); *Brunet v. City of Columbus*, 1 F.3d 390, 393-94 (6th Cir. 1993) (describing gender-based disparate impact challenges to entry-level firefighter exams for the Columbus fire department); *Davis v. City of San Francisco*, 976 F.2d 1536, 1539 (9th Cir. 1992) (describing disparate impact challenges to San Francisco fire department's hiring and promotion exams between 1970 and 1984), *vacated in part*, 984 F.2d 345 (9th Cir. 1993); *Nash v. Consol. City of Jacksonville*, 905 F.2d 355, 356 (11th Cir. 1990) (reviewing disparate impact challenge to Jacksonville fire department's promotional exam); *Johnson v. City of Memphis*, No. 00-2608, 2006 WL 3827481, at *1-6 (W.D. Tenn. Dec. 28, 2006) ("Since the early seventies the employment practices of the City of Memphis have frequently been challenged in court as discriminatory against African Americans and women.").

[14] *E.g.*, Complaint, *Bazile v. City of Houston*, No. 08-cv-02404 (S.D. Tex. filed Aug. 4, 2008) (alleging race discrimination in firefighter promotional exams); Intervenor Complaint, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y. filed Sept. 25, 2007) (alleging race discrimination in firefighter hiring exam); *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 148 (D. Mass. 2006) (alleging race discrimination in firefighter hiring and promotional exams).

[15] *See, e.g.*, *Griggs*, 401 U.S. at 426, 436 (invalidating an employer's high school diploma requirement for hiring and job transfers on the ground that it disproportionately disqualified black employees and was not justified by business necessity);

standards,[16] and no-conviction policies[17] – are in common use and are frequently challenged because of alleged adverse impact on protected groups, including racial and ethnic minorities, women, and older employees.

The disarray among the courts of appeals in adjudicating the timeliness of these frequent disparate impact challenges is contrary to Congress's determination to establish nationally uniform protection against employment discrimination. As the House Judiciary Committee report on the Civil Rights Act of 1964 explained, Title VII was enacted to provide a uniform, national solution to a national problem: "[N]ational legislation is required to meet a national need which becomes ever more obvious. . . . [The Act] is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope."

Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 236-39 (5th Cir. 1974) (invalidating a diploma requirement for admission into an apprenticeship program).

[16] *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 328-32 (1977) (invalidating Alabama's height/weight minimums for employment as a prison guard on the ground that the requirement had a disparate impact on female applicants and was not job related); *Lanning v. Se. Pa. Transp. Auth.*, 308 F.3d 286, 291-93 (3d Cir. 2002) (upholding employer's use of a physical test for employment as a transit police officer despite adverse impact against women on the ground that the test was sufficiently job related).

[17] *See, e.g., Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1298-1300 (8th Cir. 1975) (invalidating, because it had a racially disparate impact and was not job related, an employer's policy of refusing employment consideration to any applicant convicted of a crime).

H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393. Indeed, this Court has long recognized that in passing legislation to eliminate pervasive discrimination in employment, Congress sought to ensure "the effective application of uniform, fair and strongly enforced policies." *Morton v. Mancari*, 417 U.S. 535, 547 (1974) (discussing the legislative history of the 1972 amendments to Title VII) (quoting H.R. Rep. No. 92-238, at 24-25 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2159); *cf. Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (noting that Title VII requires a "uniform and predictable standard").

The split among the courts of appeals also threatens to undermine Congress's broad remedial purpose in enacting Title VII. The Seventh Circuit's ruling in this case immunized a discriminatory hiring system that was in place for more than half a decade, and that both caused and perpetuated severe racial disparities in the Chicago firefighting workforce. But Congress enacted Title VII to eliminate systems that perpetuate workplace discrimination:

> The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Griggs, 401 U.S. at 429-30.

Under the Seventh Circuit's rule, a discriminatory employment practice that is not challenged within the short charge-filing period after its initial adoption may be immunized from subsequent challenge by applicants or employees. This outcome would undermine Congress's intent to authorize civil actions by private litigants as an important means of eradicating employment discrimination: "Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority.'" *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978)); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) ("Congress gave private individuals a significant role in the enforcement process of Title VII. . . . [T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." (citations omitted)).

The entrenched split in the circuits on so central a question as when Title VII disparate impact claims accrue is untenable, especially in light of the frequency with which disparate impact challenges to employment practices arise and the clear Congressional mandate for nationally uniform application of the law.

III. The Court Below Erred.

The clear and acknowledged conflict among the circuits on this important question of employment law is sufficient, without more, to justify this Court's review. Certiorari is also warranted, however, be-

cause the Seventh Circuit's decision departs from this Court's precedents on the timeliness of employment discrimination claims and is inconsistent with the language of Title VII.

Although this Court has not had occasion to decide the claim-accrual question in a disparate impact case, the Court has established two clear principles governing claim accrual in Title VII disparate treatment cases. First, a Title VII violation exists, and a new charge-filing period consequently begins, each time an employer's actions satisfy – at the time of those actions – all elements of a violation. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2167-68 (2007) (emphasizing that the "critical question" in determining timeliness is "whether any present *violation* exist[ed]" within 300 days of the filing of the charge (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977))); *see also Del. State Coll. v. Ricks*, 449 U.S. 250, 252-54, 258 (1980).

Second, where there *are* recurring present violations of the statute, that those violations may be related to an earlier act of discrimination does not prevent new claims from accruing (and a new charge-filing period from commencing) with each subsequent act that satisfies all elements of a Title VII violation. This Court explained in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), that:

> [e]ach discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The exis-

> tence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.

Id. at 113; *see also Ledbetter*, 127 S. Ct. at 2174 ("[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations.").

Applying these principles to claims of disparate impact discrimination, an EEOC charge should be considered timely if filed within the charge-filing period after any use or application of a selection process that adversely affects protected groups. *Cf. Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 908 (1989) (noting that a claim for disparate impact discrimination would accrue at the time the adverse effect of an employment practice is felt by an individual plaintiff); *see also* 42 U.S.C. § 2000e-2(k)(1)(A) (providing that a disparate impact violation is established when an employer "uses a particular employment practice that causes a disparate impact on the basis of race" and "fails to demonstrate that the challenged practice is job related . . . and consistent with business necessity").

The Seventh Circuit's holding to the contrary results in different claim-accrual rules for disparate treatment and disparate impact cases, despite this Court's recognition that the same set of facts can be the subject of both disparate treatment and disparate impact analysis. *See Int'l Bhd. of Teamsters v.*

United States, 431 U.S. 324, 335-36 n.15 (1977) (describing the disparate treatment and disparate impact theories, and noting that "[e]ither theory may, of course, be applied to a particular set of facts"); *see also* Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* 3-2 (Supp. 2008) ("Courts . . . permit plaintiffs to assert both disparate treatment and disparate impact theories in a single case . . . .").

Accordingly, the Seventh Circuit's holding that petitioners' right to challenge the City's discriminatory hiring practice expired 300 days after the classification was first made and announced – no matter that the City subsequently used its discriminatory classification to hire firefighters for years – is wrongly decided under this Court's precedents, and should be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

for the Seventh Circuit

No. 07-2052

ARTHUR L. LEWIS, JR., *et al.*, *Plaintiffs-Appellees*,

v.

CITY OF CHICAGO, *Defendant-Appellant*.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern
Division.
No 98 C 5596—**Joan B. Gottschall**, *Judge*.

ARGUED FEBRUARY 22, 2008—

DECIDED JUNE 4, 2008

Before EASTERBROOK, *Chief Judge*, and BAUER and POSNER, *Circuit Judges*.

POSNER, *Circuit Judge*. In 1995, the City of Chicago administered a new written test to 26,000 applicants for jobs as firefighters. After grading the tests, the City placed the applicants in three categories, based on their scores: "well qualified," "qualified," and "not qualified." The plaintiffs (and the members of their class) are black applicants who were placed in the

"qualified" category. Applicants were told the test results within days after January 26, 1996, when notices of the results were mailed to all the applicants. On that day the mayor had announced that the test scores were in, but that "after all our efforts to improve diversity [including racial], these test results are disappointing." There were no names in his public announcement.

The notices stated that applicants in the qualified category were unlikely to be hired because of the large number whose scores had placed them in the "well qualified" category, but that the applicants rated "qualified" would remain on the eligible list (since they had passed the test) for as long as the list was used. In fact, as the media reported the next day, the City expected to hire only about 600 of the 1,782 applicants in the "well qualified" category in the next three years, implying that no one in the "qualified" category would be hired.

The suit, now entering its second decade, charges that the test had a disparate impact on the black applicants (that is, disproportionately classified them as "qualified" rather than "well qualified") and was not a valid test of aptitude for firefighting. If these things are true, the basing of hiring decisions on the test violated Title VII of the Civil Rights Act of 1964. After protracted proceedings, the district judge ruled in favor of the plaintiffs and decreed injunctive relief.

The City argues that the suit is untimely. The plaintiffs were required, as a prerequisite to being allowed to sue, to file a charge with the EEOC within 300 days after their claim accrued. 42 U.S.C. § 2000e-5(e)(1); *Stepney v. Naperville School District 203*, 392

F.3d 236 (7th Cir. 2004). They filed their charge on March 21, 1997, which was 420 days after the date on which notice of the results of the test had been sent them and probably 417 to 419 days after they received the notice. But it was within 300 days of the City's beginning to hire applicants from the "well qualified" list, and the district judge ruled that the suit was therefore timely because each time the City hired applicants in the "well qualified" group as determined on the basis of the January 1996 test results it committed a fresh violation of Title VII that may have harmed "qualified" applicants.

The plaintiffs acknowledge that in a "disparate treatment" case, that is, a case of intentional discrimination, the charging period begins when the discriminatory decision is made, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, --- U.S. ----, 127 S. Ct. 2162, 2168, 2172 (2007); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 910-11 (1989); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Huels v. Exxon Coal USA, Inc.*,121 F.3d 1047, 1051 (7th Cir. 1997); *Cox v. City of Memphis*, 230 F.3d 199, 204-05 (6th Cir. 2000), rather than when it is executed. We have held that if the plaintiff does not learn of the decision until later, the limitations period begins to run then. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990); see also *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385-86 and n. 5 (3d Cir. 1994). But *Hamilton v. 1st Source Bank*, 928 F.2d 86, 87-88 (4th Cir. 1990) (en banc), is to the contrary, and the question was left open by the Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, supra, 127 S. Ct. at 2177 n. 10. It is of no moment in this case.

In the *Ricks* case a college denied a faculty member tenure but offered him a "terminal" one-year contract, which he accepted. The Supreme Court held that the statute of limitations began to run from the denial of tenure rather than from the plaintiff's termination at the end of the one-year period, since that termination was the automatic consequence of the fact that he had only a one-year contract, rather than being the consequence of some fresh act of discrimination. It is the same here. The hiring only of applicants classified "well qualified" was the automatic consequence of the test scores rather than the product of a fresh act of discrimination.

The plaintiffs do not quarrel with the proposition that "well qualified" applicants should be hired ahead of those who are merely "qualified." They argue that the test that sorted applicants into those categories was discriminatory. That discrimination was complete when the tests were scored and, especially in light of the mayor's public comment about them, was discovered when the applicants learned the results. It's not as if the City had divided applicants into "a white branch" and "a Negro branch" and fixed a higher qualifying score for the latter; for then a refusal to hire a black who scored higher than a white but below the qualifying score for blacks would be an unmediated act of discrimination. See *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam); *Anderson v. Zubieta*, 180 F.3d 329, 335-36 (D.C. Cir. 1999); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 346 (4th Cir. 1994). The refusal to hire would not be due, even in the first instance, to the policy of basing hiring on test scores, since, by hypothesis, some blacks would have had higher scores than some whites yet, purely because of

the racial division, would not have been hired. This case is different because "well qualified" is not a racial category, though its racial composition may have been influenced by a discriminatory decision taken earlier.

In *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796-800 (11th Cir. 1992), on which the plaintiffs heavily rely, the employer limited insurance coverage to employees' children who lived with their employee parent, and the charge was that this discriminated against male employees. The plaintiffs sued long after the policy was adopted but within 180 days (the limitations period applicable to them) of the denial of their claim for dependent coverage, and this was held to be timely because the allegedly discriminatory policy was the sole cause of the denial; there was no intervening neutral act, as in this case.

The distinction is a fine one (and it is arguable on which side of it the facts of *Beavers* fell) but it is the distinction that the Supreme Court has drawn. The plaintiffs argue that it does not apply to a disparate-impact case, but we cannot think why not. The difference between the two types of discrimination case is not fundamental. Disparate-impact analysis, much like the *McDonnell Douglas* method of establishing a prima facie case, involves the use of circumstantial evidence to create an inference of discrimination. "The concept of disparate impact was developed for the purpose of identifying discriminatory situations where, through inertia or insensitivity, companies were following policies that gratuitously—needlessly—although not necessarily deliberately, excluded black or female workers from equal employment opportunities. Often these were policies that had been adopted originally for discriminatory reasons and had

not been changed when the employer ceased deliberately discriminating—if he had; for another way of looking at the disparate impact approach is that it is primarily intended to lighten the plaintiff's heavy burden of proving intentional discrimination after employers learned to cover their tracks." *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992) (citations omitted). So if a test or other method of screening applicants for employment bears more heavily on one protected group than on another, the burden shifts to the employer to show that the method is a rational method of selecting employees. 42 U.S.C. § 2000e-2(k); see *Allen v. City of Chicago*, 351 F.3d 306, 311-12 (7th Cir. 2003); *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 240-41 (3d Cir. 2007); *Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d 134, 139 (2d Cir. 2006). If he cannot show this, his continuing to use the test suggests that his purpose in doing so may be discriminatory, although that need not be shown.

Why any of this should change the date on which the statute of limitations begins to run escapes us; and years ago, in *Davidson v. Board of Governors*, 920 F.2d 441, 445 (7th Cir. 1990), we held that it does not. An applicant who fails to meet the employer's standard is hurt not by a fresh act of discrimination, but as the automatic consequence of an earlier one—the adoption of the standard. See also *Cox v. City of Memphis*, *supra*, 230 F.3d at 204-05; *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074, 1083-84 (3d Cir. 1981).

The Ninth Circuit reached a contrary result in *Bouman v. Block*, 940 F.2d 1211, 1221 (9th Cir. 1991), but did so on the mistaken premise that until the

plaintiff was not promoted she could not be "certain" that the use of the allegedly discriminatory eligibility list would have that consequence and until she was certain her claim would not accrue. As explained in *Davidson*, if a plaintiff cannot by exercise of reasonable diligence determine within the statutory period whether he has been injured by an unlawful practice, then even though his claim accrued when the practice was adopted the doctrine of equitable tolling will allow him to delay suing until he can collect the information he needs in order to be able to sue. 920 F.3d at 445. (The plaintiffs in this case argue equitable tolling, but unavailingly as we shall see.) "[W]hen there is only one wrongful act the claim accrues with the first injury." *Palmer v. Board of Education of Community Unit School District 201-U*, 46 F.3d 682, 686 (7th Cir. 1995). The first injury in this case was the classification of the black applicants as merely "qualified" on the basis of a test that they contend was discriminatory.

The plaintiffs argue in the alternative that the City's violation of Title VII was a "continuing violation." The phrase does not mean what it seems to mean. Suppose that year after year for ten years your employer does not pay you the minimum wage. That is a continuing violation in an acceptable sense of the term in ordinary language, though "repetitive violation" would be more precise. But the recurrent nature of the defendant's conduct would not entitle you to wait until year 15 (assuming the statute of limitations was five years) and then sue not only for the wages you should have received in year 10 but also for the wages you should have received in years 1 through 9. The statute of limitations begins to run

upon injury (or discovery of the injury) and is not restarted by subsequent injuries. *Knight v. Columbus*, 19 F.3d 579, 581 (11th Cir. 1994); *Hendrix v. City of Yazoo City*, 911 F.2d 1102, 1103 (5th Cir. 1990); cf. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997). That is the "first injury" rule.

The *doctrine* of continuing violation allows you to delay suing until a series of acts by a prospective defendant blossoms into a wrongful injury on which a suit can be based. *Limestone Development Corp. v. Village of Lemont*, 520 F.3d 797, 801 (7th Cir. 2008); *Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1011-12 (7th Cir. 2003); *Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998); *Glass v. Petro-Tex Chemical Corp.*, 757 F.2d 1554, 1561 (5th Cir. 1985). Despite its name, it is a doctrine about cumulative rather than continuing violation. A typical case is workplace harassment on grounds of sex. The first instance of a coworker's offensive words or actions may be too trivial to amount to actionable harassment, but if they continue they may eventually amount to an actionable pattern of harassing behavior. And then the entire series is actionable. E.g., *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002); *DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 435 (7th Cir. 2000); *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1166 (7th Cir. 1996); *Jensen v. Henderson*, 315 F.3d 854, 859 (8th Cir. 2002); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 482 (3d Cir. 1997). If each harassing act had to be considered in isolation, there might be no actionable claim even when by virtue of the cumulative effect of the acts it was plain that the plaintiff had suffered unlawful harassment. There is nothing of that sort here. The

plaintiffs were injured, and their claim accrued, when they were placed in the "qualified" category of the hiring list on the basis of their score in the firefighters' test; for that categorization delayed indefinitely their being hired.

Extension of the "continuing violation" doctrine in the manner urged by the plaintiffs would have ludicrous consequences. The plaintiffs received notification of their "qualified" status in 1995; could they ten years later ask to be hired as firefighters and when turned down sue the City for violating Title VII because the reason for not hiring them was that were not in the "well qualified" part of the hiring list? The answer implied by the plaintiffs' argument is "yes."

The plaintiffs further argue that even if their claim accrued in January 1996, the running of the statute of limitations was tolled (stopped) because they could not determine within 300 days whether they had a case. The City claimed that its hiring test had been validated by an expert, but it was slow to produce the expert report for the plaintiffs to scrutinize.

The doctrine of equitable tolling allows a plaintiff additional time within which to sue (or meet some other deadline) if even diligent efforts on his part would not have enabled him to prepare and file his suit within the statutory period. E.g., *Beamon v. Marshall & Ilsley Trust Co.*, 411 F.3d 854, 860-61 (7th Cir. 2005); *Cada v. Baxter Healthcare Corp.*, *supra*, 920 F.2d at 451; *Chung v. United States Department of Justice*, 333 F.3d 273, 278-80 (D.C. Cir. 2003); *EEOC v. Kentucky State Police Department*, 80 F.3d 1086, 1096 (6th Cir. 1996). The question is whether the plaintiffs in this case knew enough within 300 days of

the announcement of the test results to file a charge with the EEOC. The deadline is short, but a charging party is not required to conduct a precomplaint investigation, *Cada v. Baxter Healthcare Corp., supra,* 920 F.2d at 452, as he would have to do if he were filing a suit. To impose such a requirement would frustrate "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Edelman v. Lynchburg College,* 535 U.S. 106, 115 (2002), quoting *EEOC v. Commercial Office Products Co.,* 486 U.S. 107, 124 (1988). The EEOC is supposed to do the investigating. *EEOC v. Shell Oil Co.,* 466 U.S. 54, 68 (1984).

And even a precomplaint investigation need not inquire into possible defenses, such as the defense that an employment requirement having a discriminatory impact is a bona fide qualification for hiring. To file a suit, you need only have a prima facie case; you are not required to plead the nonapplicability of possible defenses. *Gomez v. Toledo,* 446 U.S. 635, 640 (1980). "Complaints need not contain *any* information about defenses and may not be dismissed for that omission." *Xechem, Inc. v. Bristol-Myers Squibb Co.,* 372 F.3d 899, 901 (7th Cir. 2004) (emphasis in original). See also *Oakes v. United States,* 400 F.3d 92, 98 (1st Cir. 2005). The information bearing on the existence of a meritorious defense is likely to be in the defendant's possession, or at least more readily accessible to him than to the plaintiff; relative access is one of the criteria for parceling out issues between the plaintiff's case and the defendant's case. Moreover, precomplaint investigation of possible defenses would often be to a great degree wasted motion, because a plaintiff cannot be certain which defenses the defendant will plead,

and so he would end up investigating some defenses that turned out not to be pleaded.

The plaintiffs' lawyer admitted at argument, moreover, that his reason for not filing the charge within 300 days was not that he needed more time to be able to file such a charge but that he didn't think it necessary because he thought that the statute of limitations would not begin to run until the City began hiring applicants from the "well qualified" category on the list. That was a fatal mistake.

The judgment is reversed with directions to enter judgment for the defendant.

REVERSED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTHUR L. LEWIS, JR., et al.,

Plaintiffs,

v.

CITY OF CHICAGO,

Defendant.

Judge Joan B. Gottschall

Case No. 98 C 5596

Entered Mar. 24, 2005

MEMORANDUM OPINION AND ORDER

Plaintiffs, the African-American Fire Fighters League of Chicago (the "League") and a class of African-Americans who applied for entry-level firefighter jobs with the Chicago Fire Department ("CFD") and who scored between 65 and 88 on an entrance exam administered to firefighter candidates in 1995 (the "1995 Test") by defendant City of Chicago ("City"), have sued the City alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Specifically, plaintiffs argue that the City's decision to select only those firefighter applicants who scored at least 89 points on the 1995 Test had an unjustified adverse impact on African-American applicants. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The City concedes that its hiring procedure had an adverse

impact on African-American applicants, but argues that: (1) the 1995 Test validly measured some of the cognitive skills necessary to training and for performing the job of firefighter; and (2) the City's decision to set a cut-off score of 89 was justified by administrative convenience in that the City wanted to limit the number of applicants that it accepted for further evaluation.

The court conducted an eight-day bench trial on plaintiffs' claims in January 2004. The parties submitted post-trial findings of fact and conclusions of law, post-trial motions for ruling on unresolved motions *in limine* and evidentiary objections, motions related to the issue of the League's standing to join plaintiffs' class claims against the City, and supplemental authority related to the court's May 25, 2000 ruling denying the City's motion for summary judgment on grounds of untimeliness. These matters were fully briefed before the court as of August 2, 2004.

For the reasons that follow, the court rules in favor of plaintiffs on the liability aspects of their discrimination claim against the City. The court finds that the City has not carried its burden of proof in this case; it has not proven that its decision to hire only those applicants who scored 89 and above on the 1995 Test was consistent with business necessity. To the contrary, the evidence at trial demonstrated that: (a) the 1995 Test may not be a reliable measure of the four cognitive abilities it was intended to measure; (b) the 89 cut-off score was a statistically meaningless benchmark; (c) even if the 1995 Test could reliably measure what it was supposed to measure, it could not distinguish between those who were qualified for the

position of CFD firefighter and those who were not; and (d) less discriminatory, and equally convenient, selection strategies were available. In short, the City has not proven that its discriminatory selection process was justified. The court, therefore, finds the City's selection procedure unlawful under Title VII.

BACKGROUND[1]

The City's Hiring Procedure

Since 1996 and through the present, the City has relied on test scores from a written exam given in 1995 as the primary basis for selecting entry-level firefighters. On July 26 and 27, 1995, the City administered the exam to approximately 26,000 people who satisfied the minimum registration requirements of: (1) being at least 18 years old; (2) living in the City of Chicago; and (3) holding a high school degree or its equivalent. After scoring the exam, the City decided that, with exceptions for military veterans and certain paramedics, only applicants with scores of 89 and higher—out of a possible 100 points—would be eligible

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[1] Plaintiffs have moved to admit into evidence several exhibits (Pl. Exs. 16, 18, 37-39, 42, 43-49, 50, and 55-61) that were introduced at trial over the City's objection. The City continues to object to the admission of this evidence, primarily on the grounds of unfair prejudice. Fed. R. Evid. 403. In the context of a bench trial, however, Rule 403 objections have no logical application and are routinely overruled. As this case was not tried before a jury, the court fails to understand how the City will be prejudiced by the court's consideration of any and all material introduced during the bench trial. To the extent the material was relevant and probative of plaintiffs' case or the City's defense, the court has so considered it, and to the extent the evidence was irrelevant or unfairly prejudicial, the court has disregarded it. Plaintiffs' motion for the admission of evidence is granted.

to proceed to the next phase of the hiring process, a physical abilities test. Applicants who passed the physical abilities test were subject to a background investigation, and those passing the background check were given a medical exam and a drug test. Once an applicant passed all of the City's preliminary tests, he or she was hired as a candidate firefighter. To become a full firefighter with the CFD, candidates were required to complete the Chicago Fire Academy's (the "Academy's") training program and to pass the Illinois board certification exam.

It is undisputed that the City's decision to set the cut-off score for the 1995 Test at 89 points had a severe disparate impact on African-American applicants. Of the 26,000 applicants taking the exam, 11,649 (45% of test takers) were white and 9,497 (37%) were African-American. It is undisputed that there is no difference between whites and African-Americans in firefighter performance. However, there were pronounced group differences in performance on the 1995 Test: the difference between the mean score of whites and the mean score of African-Americans on the 1995 Test was almost a full standard deviation.[2] The disparate impact of the 1995 Test was heightened by the City's use of the 89 cut-off score. Approximately 12.6% of whites compared to 2.2% of African-Americans scored 89 or above. In other words, the City's decision to select only those applicants who scored 89 and above meant that white applicants were five times more likely than African-Americans to advance to the next

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[2] A standard deviation is a statistical measure of the dispersion of results from the mean. The standard deviation tells us how far a typical member of a population is from the average member of that population.

stage of the hiring process.

From 1996 to 2001, the City advanced applicants for entry-level firefighter positions from the "well-qualified" pool (those who scored 89 and above on the 1995 Test). The City made a few exceptions to the 89 cut-off score: from 1996 to 2001, the City hired approximately 182 paramedics and 325 military veterans with scores between 65 and 88. The City considered those paramedics and veterans qualified for the position of probationary firefighter despite their lower scores on the 1995 Test. By the summer of 2001, the City had run out of candidates from the "well-qualified" pool and decided to begin processing applicants at random from the "qualified" pool (those scoring between 65 and 88). Most of the 100 cadets entering the Academy in the fall of 2002 received a score between 65 and 88. That class graduated from the Academy at the end of April 2003. There is no evidence that those firefighters from the Academy class of 2003 are any less qualified, in any respect, than those hired with test scores of 89 or above. Moreover, virtually all candidates who have entered the Academy – regardless of test performance – have successfully completed their training and passed the state certification examination.

The Development of the 1995 Test

The City devoted considerable resources to creating the 1995 Test. The City hired the consulting firm Human Performance Systems, Inc. ("HPSI"), and Dr. James Outtz, an industrial organizational psychologist with extensive experience designing and evaluating entrance tests, to develop its firefighter exam. The 1995 Test was constructed using a "content-oriented"

test validation strategy, which measures whether the content of the test reflects important aspects of performance on the job for which the candidates are being evaluated. The City chose not to pursue a "criterion-related" validation strategy, which uses empirical data to show that the test can predict (or at least correlates to) the test taker's ability to perform the job. The City avoided the "criterion-related" approach because it did not have the data required to link test performance to job performance: the City had security concerns about giving the test to incumbent firefighters, and the CFD does not conduct formal evaluations of firefighter performance.

The City's "content-based" job analysis aimed to: (1) identify the tasks performed by firefighters on the job; (2) identify the knowledges, skills, and abilities required to perform the tasks effectively; (3) eliminate from consideration for testing those tasks that were unimportant or done infrequently and those abilities that were not "needed day one" (*i.e.*, prior to training); and (4) link the remaining knowledges, skills, and abilities to tasks that require them. Those knowledges, skills, and abilities that survived the job analysis procedures were termed "critical" or "essential." The job analysis for Chicago firefighter proceeded in three broad phases: (a) a "job inventory," which identified the tasks and abilities required to perform the job; (b) a "job analysis questionnaire" to collect ratings from incumbent firefighters of the job tasks, knowledges, skills, and abilities identified by the job inventory; and (c) a "linkage questionnaire" which required incumbent firefighters to link important knowledges, skills, and abilities identified from the job analysis questionnaire to "task groups" comprising the firefighter job.

The job analysis conducted by Dr. Outtz and HPSI yielded a list of 46 skills deemed critical to the job of Chicago firefighter. Of these 46, 18 were deemed "essential" and "needed day one," meaning they were required of firefighter candidates before training at the Academy. Of those 18 "needed day one" abilities, Dr. Outtz and HPSI determined that 8 were physical skills, 3 were essentially untestable because of their intangible qualities, and 7 were "cognitive" skills appropriate for testing on a written exam. Of those 7 cognitive abilities, 4 were tested by the 1995 exam: (1) the ability to comprehend written information; (2) the ability to understand oral instructions; (3) the ability to take notes; and (4) the ability to learn from or understand based on demonstration.

The 1995 Test had two parts, a multiple choice "pencil and paper" section and a video demonstration section. The written portion of the exam was designed to measure an applicant's ability to comprehend written information. The 1995 Test was written at a twelfth-grade reading level, which approximated the reading level of the materials used at the Academy and written CFD policies and procedures. The video portion of the exam was designed to measure an applicant's ability to understand oral instructions, ability to take notes, and ability to learn from or understand based on demonstration. The subject of the video was a fictitious mechanical device called a "fuel converter system." Applicants were first shown the device and its components on the video screen, along with a "trainer" and "trainee" using the device, while an off-camera narrator explained its operation. Applicants were then asked questions about the device based on the information that had just been shown on

the video. Prior to taking the exam, applicants were given reference booklets that contained the written material upon which the test questions would be based and a description of the fictitious device that would be the subject of the video component. Applicants were permitted to refer to these materials during the exam.

The Scoring Of The 1995 Test And The City's Selection of Candidates

Raw scores on the written and video components of the 1995 Test were: (1) corrected according to standard statistical methods; (2) weighted at 15% and 85%, respectively, to reflect the importance of the cognitive abilities being tested in each section; and (3) converted to a 100-point scale. The distribution of scores ranged from a low score of 12 points to a high score of 98 points with an average score of 75. The City set the passing score for the exam at 65, which was one full standard deviation below the mean. The City concedes that every applicant scoring 65 and higher on the 1995 Test possessed the minimum level of cognitive ability to master the Academy curriculum and perform the job of firefighter. Out of approximately 26,000 people taking the exam, 93.45% of whites and 72 .3% of African-Americans "passed" with a score of at least 65 points and were thus considered "qualified" to advance in the hiring process.

With the results of the 1995 Test in hand, the City's Deputy Commissioner of Personnel, Robert Joyce, set a cut-off score of 89, selecting only those applicants who scored at least 89 points for further evaluation. That decision had a profound effect on the racial makeup of the candidate pool. The so-called "highly qualified" pool—those who scored 89 and above—from which the

City hired all of its entry-level firefighters from 1996 to 2001, was comprised of approximately 5.4 times more whites than African-Americans. By contrast, the "qualified" pool of applicants—those who passed the 1995 Test by scoring a 65 or above—was comprised of only 1.3 times more whites than African-Americans. In arriving at the cut score of 89, Joyce testified that the City considered: (1) the hiring needs of the CFD during the three to five years the City planned to rely on the results of the 1995 Test; (2) the fairness to applicants of identifying several thousand applicants as "qualified" for further processing when only several hundred of them would ever be hired; and (3) the adverse impact of setting the cut score at various points higher than the passing score of 65. Joyce also stated that he assumed, based on Dr. Outtz's analysis of the test scores, that the 1995 Test was valid, meaning "you can make some inferences from [the test] scores. The higher scores—in a very general way, higher scores are more predictive of success than lower scores."

However, Joyce's assumption was not correct and his decision to set the cut-off score at 89 did not account for the statistical properties of the 1995 Test. Dr. Outtz testified that, based on his statistical analysis of the 1995 Test, he initially recommended that the City set the cut-off score by counting down from the top score of 98 in 13-point increments. He arrived at his 13-point band by calculating the "standard error of the difference," an index measuring the extent to which a difference in scores is statistically significant or due to chance, based on the internal "reliability" of the 1995 Test. The reliability of a test refers to the extent to which scores are free from

random error, *i.e.*, the extent to which retesting of a given applicant is expected to yield a consistent result. Since retesting was not an available option, Dr. Outtz instead calculated reliability by comparing the consistency of answers given to different questions on the 1995 Test by the individual applicants who took it. By Dr. Outtz's calculations, the 1995 Test had a reliability coefficient of .77, meaning that approximately 23% of the variance in individual scores was due to random error.

Based on that calculation, Dr. Outtz determined that there is no statistical difference between any two scores from the 1995 Test that are within 13-points of each other, *i.e.*, a score of 98 cannot be meaningfully distinguished from a score of 85. Given the statistical properties of the 1995 Test, Dr. Outtz concluded that there was a "psychometric basis"—a basis rooted in cognitive analysis—for setting the cut score using that 13-point band. As he explained, "[T]here is a psychometric basis for saying, for reaching the inference that the people who are within the band that I had determined . . . have more of the abilities measured by the test than people outside the band."[3] Dr. Outtz also testified, however, that there was no psychometric basis for setting the cut score at any point within the 13-point band. In other words, in Dr. Outtz's opinion, a score of 89 could not be statistically

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[3] For example, according to Dr. Outtz's testimony, a cut-off score of 85 would be somewhat defensible as it would "capture" all of the scores that are indistinguishable from the top score of 98. Although there would be no way to differentiate candidates within the 13-point range, there would be a basis for claiming that an individual who scored 98 has greater tested skills than an individual who scored 84.

distinguished from a score of 87 or 88, two lower scores within the 13-point range below the top score of 98. Because the standard error of the difference was so large, Dr. Outtz discussed with the City the possibility of randomly selecting candidates from the pool of applicants who passed the 1995 Test with a score of 65.

Despite Dr. Outtz's conclusion that the 1995 Test could not distinguish between scores within 13 points of each other, the City decided to set the cut score at 89, only 11 points below the highest score. Joyce testified that he made the decision to hire only those applicants scoring 89 and above: (a) against Dr. Outtz's recommendation: and (b) with full awareness of the 1995 Test's disparate impact on African-Americans generally, and of the even greater disparate impact on African-Americans caused by setting the cut score at 89. Joyce testified that he set the cut-off score at 89 because it was the most administratively convenient way to trim the list of potential applicants to a manageable number while still fulfilling the hiring needs of the CFD.

Approximately six months after the 1995 Test was given, the City sent all applicants notices of their final scores. The City grouped the scores into three categories: applicants who scored 89 and above were considered "well qualified" and were eligible to advance in the hiring process; applicants who scored between 65 and 88 were considered "qualified"; and applicants who scored below 65 failed the examination. Applicants in the "qualified" pool—the plaintiff class in this case—were informed that, due to the large number of applicants who received higher scores, and based on the hiring needs of the CFD, it was not likely

that they would be called for further processing. However, the "qualified" pool was also told that "because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used."

On the same day that the City mailed the notice of scores to applicants, the City issued a press release detailing the results of the exam, including its disparate impact on minority applicants. Representatives from the League and a number of class plaintiffs met with counsel to discuss the legal implications of the 1995 Test. During the following year, plaintiffs' counsel obtained technical information from the City regarding the test's development and validation, which plaintiffs' experts reviewed. Based on the results of this analysis, several plaintiffs filed charges of discrimination with the EEOC. Plaintiffs then filed this lawsuit in September of 1998, seeking damages under Title VII for the City's unlawful use of the 1995 Test in its firefighter hiring practices.

ANALYSIS

I. Pre-Trial Motions

Before turning to the merits of plaintiffs' Title VII claim, the court will briefly address two preliminary matters.

First, the City has challenged the standing of the League as a plaintiff, arguing that the League: (a) is not a proper plaintiff under Title VII; and (b) does not otherwise meet the constitutional requirements for standing: injury in fact, causation, or redressability. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-

61 (1992). The court disagrees. It is undisputed that the League is a non-profit organization made up of African-American firefighters, which, among other activities, seeks to recruit additional African-Americans to the CFD, increase African-American representation in the CFD, train African-American members of the CFD for promotional exams, and fight racism within the CFD. The disparate impact of the 1995 Test on African-American firefighter candidates has caused the League to suffer a concrete injury: decreased membership as a result of fewer African-Americans being hired for the position of firefighter. Additionally, the remedies available to the class plaintiffs under Title VII, particularly a hiring remedy, will likely redress the League's injury because more African-American firefighters means more potential members for the League. Moreover, because one of the primary aims of the League is to combat discrimination against African-Americans in the CFD, prevailing in this action will further the mission of the League. The type of injury suffered by the League and its likelihood of redress if it prevails is sufficient to justify the League's standing as a plaintiff in this case.

Second, plaintiffs have renewed their motion for judicial estoppel which was denied by the court without prejudice prior to trial.[4] Plaintiffs argue that the City should be judicially estopped from seeking to

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[4] At the time the court denied plaintiffs' motion, it did not have the benefit of hearing the parties' theories of the case or their evidence in support, and did not believe it was in a position to rule on plaintiffs' motion. Now, of course, the court is well aware of the City's defense to plaintiffs' claims and can properly evaluate whether the City should be estopped from seeking to establish facts that appear contrary to those relied on in *Horan*.

establish facts regarding the 1995 Test which are contrary to factual positions upon which the City prevailed in another case involving that test, *Horan v. City of Chicago*, No. 98 C 2850, 2003 U.S. Dist. LEXIS 17173 (N.D. Ill. Sept. 30, 2003).

In *Horan*, white incumbent firefighters challenged a series of CFD affirmative action personnel decisions made by the City. As here, the parties' positions in *Horan* focused, in part, on their characterization of the results of the 1995 Test. In challenging the affirmative action decisions of the City, the *Horan* plaintiffs attempted to prove "that the 1995 entrance examination was content valid" and that firefighters with scores of 89 and higher on the 1995 entrance examination were better qualified than those with lower passing scores. *Horan*, 2003 U.S. Dist. LEXIS 17173, at *185. During the bench trial and in its proposed findings of fact submitted after trial, the City contested that argument and took positions that appear to question the validity of the 1995 Test and, therefore, ostensibly undermine positions taken by the City in this case.

The City's defense in *Horan* was that the 1995 Test could not predict overall firefighter performance. The City argued that the job of firefighter depended on proficiency in a number of physical, psychological, emotional, and cognitive skills and abilities, and that the 1995 Test, itself a measure of only a narrow set of cognitive abilities, could not predict on-the-job performance. In so arguing, the City took factual positions that, at least in some respects, are inconsistent with positions it has advanced in this case. For example, whereas the City now claims that the 1995 Test is a valid predictor of at least some

aspects of firefighter performance or trainability, the City in *Horan* asserted that there was no evidence that those applicants who scored 89 and above on the 1995 Test were any better qualified to perform the job of firefighter than individuals who obtained a score between 65 and 88. Moreover, whereas the City now claims that success on the 1995 Test is an indicator of overall cognitive ability, the City in *Horan* argued that there are numerous cognitive abilities required by the firefighter position that are not measured by the 1995 Test.

Plaintiffs in this case argue that the City ought to be estopped from switching tack from their prevailing position in *Horan*. "When a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001). "The purpose of the doctrine . . . is to reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant." *Ladd v. ITT Corp.*, 148 F.3d 753, 756 (7th Cir. 1998). In other words, "a party who prevails on one ground in a lawsuit cannot turn around and in another lawsuit repudiate the ground. If repudiation were permitted, the incentive to commit perjury and engage in other litigation fraud would be greater. A party envisaging a succession of suits in which a change in position would be advantageous would have an incentive to falsify the evidence in one of the cases, since it would be difficult otherwise to maintain inconsistent positions." *McNamara v. City of Chicago*, 138 F.3d 1219, 1225 (7th Cir. 1998) (citations omitted).

Although it is a close question, after hearing the

City's evidence in this case and comparing it to the City's prevailing positions in *Horan*, this court concludes that judicial estoppel is not applicable. Here, the City does not argue (or at least has not attempted to prove) that the 1995 Test accurately predicts overall job performance. Rather, the City's position appears to be that the 1995 Test predicts performance on a few of the cognitive aspects of the job related to "trainability." As discussed below, that position is not adequately supported and, in any event, is contrary to the City's obligations under Title VII. However, the court will not go so far as to hold the City estopped from espousing this argument. While the City's position in *Horan* may severely undermine its defenses in the instant case, its position is sufficiently different from its position in *Horan* to avoid estoppel.

That said, the court agrees with plaintiffs that factual assertions made by the City to the court in *Horan*, to the extent they are relevant in this case, are admissible as party admissions under Fed. R. Evid. 801(d)(2). Thus, the court admits into evidence Plaintiffs' Exhibit 61, which contains numerous proposed findings of fact submitted by the City after its trial in *Horan*. As discussed below, the admissions in *Horan* expose the weaknesses in the City's defenses in this case.[5]

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[5] In addition to its other pre-trial motions, the City has filed a motion to introduce supplemental authority related to the timeliness of plaintiffs' claims. The court has already granted that motion. However, to the extent the City's additional motion also seeks reconsideration of the court's order denying the City summary judgment on this issue, the motion is denied.

II. The Merits Of Plaintiffs' Title VII Claim

The court now turns to the merits of plaintiffs' discrimination claim. Title VII employs a burden-shifting approach for disparate impact claims, which requires plaintiffs to prove first that the challenged, facially-neutral employment practice had a disparate impact on a protected class of people. 42 U.S.C. § 2000e-2(k)(1)(A)(i). In this case, the disparate impact of the 1995 Test is not in dispute; the parties have stipulated that the 1995 Test, used with a cut-off score set at 89, had a severe disparate impact on African-American firefighter candidates. Therefore, the burden of proof in this case shifts to the City to prove that its use of the 1995 Test was "job related for the position in question" and "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the City justifies the adverse impact of the 1995 Test, the burden shifts back to plaintiffs to prove that a substantially equally valid, and less discriminatory alternative to the challenged practice was available but not employed. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

The 1991 Civil Rights Act defines the City's burden of proof, codifying the concepts of job relatedness and business necessity "enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989)." Pub.L. 102-166 § 3. The Seventh Circuit has clarified this standard, holding that "*Griggs* does not distinguish business necessity and job relatedness as two separate standards. It states that: 'The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited.'"

Bew v. City of Chicago, 252 F.3d 891, 894 (7th Cir. 2001) (quoting *Griggs*, 401 U.S. at 431). In other words, an employment test shown to have a disparate impact is presumptively unlawful unless it "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used." *Griggs*, 401 U.S. at 431.

To prevail in this case, therefore, the City must prove that its decision to hire only those applicants who scored 89 and above on the 1995 Test was "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). The critical question here is not so much whether the 1995 Test actually measures skills that are part of the job of firefighter, but whether setting the cut-off score at 89 "properly discriminate[d] between those who can and cannot perform the job well." *Bew*, 252 F.3d at 895; *Allen v. City of Chicago*, No. 98 C 7673, 2002 U.S. Dist. LEXIS 18973, at *10 (N.D. Ill. Sept. 30, 2002) (explaining that "[t]ests are valid if, and only if, they predict performance").

The court finds that, by that standard, the City has failed to prove that its use of the 1995 Test with a cut-off score of 89 was justified by business necessity and, therefore, the City's Title VII defense cannot succeed. The City's "business necessity" defense hinges on two central arguments: (1) that the 1995 Test is an effective measure of the applicants' relative abilities as to four specific cognitive skills; and (2) an applicant's performance on the 1995 Test, at least in some respects, can predict (or correlates to) that applicant's

performance on certain aspects of the job of Chicago firefighter. As explained below, the City's proof falls short on both arguments. The evidence at trial demonstrated that: (a) there are serious questions regarding whether the 1995 Test can reliably measure the four cognitive skills it was designed to measure; (b) the cut-off score of 89 is statistically meaningless in that it fails to distinguish between candidates based on their relative abilities; and (c) even assuming that the 1995 Test reliably measures the skills it is supposed to measure (and that the 89 cut-off score is a meaningful benchmark), the City failed to prove that test results could be used to predict firefighter performance, *i.e.*, that those who scored 89 or higher on the 1995 Test were more qualified for the job than those who scored between 65 and 89. In short, the court finds that the City has failed to prove that its selection process—which disproportionately excluded African-American applicants from the firefighter candidate pool—was justified by business necessity. Therefore, the court holds that selection procedure unlawful under Title VII.

A. The Ability Of The 1995 Test To Reliably Measure The Cognitive Skills That It Was Designed To Measure.

Before reaching the question whether the 1995 Test can accurately distinguish between those who can perform the job of firefighter and those who cannot, the court must address the threshold question whether the City has proven that the 1995 Test can reliably measure the four cognitive skills that it was designed to measure. After all, if the 1995 Test cannot even measure the cognitive skills in question, the City cannot reasonably claim that its reliance on the 1995

Test was justified by business necessity. The court has serious concerns regarding the City's proof on this threshold question.

The statistical reliability of the 1995 Test was established at trial; Dr. Outtz testified that 23% of the variance in an individual's score could be blamed on random error. Although that figure indicates that the 1995 Test is a relatively blunt instrument, the 1995 Test's reliability coefficient is within the acceptable range. However, the court's concerns are more fundamental: regardless of the effect of random error, it is not clear that the 1995 Test measures what it is supposed to measure. Rather, the evidence at trial indicated that design flaws in the video portion of the 1995 Test may have significantly affected the 1995 Test's ability to measure some of the cognitive skills at issue.

The video demonstration section was an entirely novel test, created in the hope that using an audiovisual component in the 1995 Test might minimize adverse impact. Like the rest of the 1995 Test, the video portion had never been "piloted" in a practical setting before its debut, was never used prior to the 1995 Test and has not been used since. According to Dr. Outtz, the video section—which represented 85% of the applicant's total score—was designed to measure three cognitive skills: an applicant's ability to: (a) understand oral instructions; (b) take notes; and (c) learn from or understand based on demonstration. Those skills were not measured by any other portion of the 1995 Test. However, the evidence at trial demonstrated that, contrary to that design, the results of the video portion of the 1995 Test hinged almost entirely on a single skill—the candi-

date's ability to take notes. Information in the video portion of the 1995 Test is complex, involves fictitious subject matter and is presented very quickly. Based on testimony from plaintiffs' expert, Dr. Cranny, as well as the court's own observation of the video demonstration, the court is persuaded that, aside from those test-takers blessed with a photographic memory, performance on the video portion of the 1995 Test depends on the applicant's ability to take effective notes while not missing any of the information conveyed by the video. The video demonstration is chaotic and is 83 minutes long. The questions asked of candidates at the end of the demonstration require the candidates to recall specific facts from the 83 minute demonstration. If a candidate does not take voluminous and accurate notes during those 83 minutes, that candidate will perform poorly on that section regardless of his or her other cognitive abilities.

That design flaw is compounded by the fact that, even according to the City's own job analysis, the ability to take notes is not particularly important in performing the job of firefighter. The job analysis performed for the 1995 Test revealed that "note-taking" was dead last among the 46 identified abilities required for the job of Chicago firefighter. In fact, two subsequent job analyses for the position of San Francisco firefighter, performed in 1996 and 2000, failed to identify "note-taking" as a skill required by the position at all.

In short, the evidence at trial reflected that, contrary to the intentions of the 1995 Test's designers, the 1995 Test was skewed towards one of the least important aspects of the firefighter position at the expense of more important abilities. That fact

undermines the 1995 Test's utility as a valid measure of candidates' relative cognitive skills and, therefore, undermines the City's defense in this case.

B. Inability Of The 89 Cut-Off Score To Distinguish Between Qualified And Unqualified Candidates.

As stated above, the keystone of the City's "business necessity" defense in this context is whether the City's selection strategy could distinguish between those qualified to be a firefighter and those who are not qualified for that position. However, the uncontradicted evidence at trial established that, contrary to that standard, the City's cut-off score of 89 could not—and was never intended to—make that distinction.

To survive a disparate impact challenge, "[A] discriminatory cutoff score on an entry level employment examination must be shown to measure the minimum qualifications necessary for successful performance of the job in question." *Lanning v. Southeastern Pennsylvania Transp. Authority (SEPTA)*, 181 F.3d 478, 481 (3d Cir. 1999); *United States v. Delaware*, No. Civ. A. 01-020-KAJ, 2004 WL 609331, at *24 (D. Del. Mar.22, 2004) (explaining that "minimum qualifications necessary" means "likely to be able to do the job"). As interpreted by the Seventh Circuit, this means that a cut score may satisfy the business necessity requirement if it is based on "a professional estimate of the requisite ability levels, or, at the very least by analyzing the test results to locate a logical break-point in the distribution of scores." *Gillespie v. Wisconsin*, 771 F.2d 1035, 1045 (7th Cir. 1985).[6] The cut-off score of 89 in this case simply does

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[6] The EEOC's Uniform Guidelines—which are "entitled to

not satisfy those criteria.

In fact, the cut score of 89 was a statistically meaningless benchmark; it provided no information regarding the relative abilities of the test-takers. As explained above, *supra,* pp. 8-9, because of the 1995 Test's large margin of error, Dr. Outtz—the 1995 Test's creator and one of the City's expert witnesses in this case—proposed scoring the 1995 Test using a sliding band of 13 points from the highest score of 98. Dr. Outtz made that proposal because he could not find any statistical difference between scores that are within 13 points of each other. Dr. Outtz testified that, because of the significant rate of error inherent in the 1995 Test, a cut-off score of 89 had no psychometric basis, meaning, there was no basis for an inference that people who had a higher score within the 13-point band possessed more of the abilities measured by the 1995 Test than people who scored at the lower end of that range. Dr. Outtz informed the City of the shortcomings of the 1995 Test, notifying the City of the 1995 Test's 13-point margin of error and warning that there was no statistical basis for setting the cut-off score within that 13-point band.

The evidence demonstrated that the City ignored Dr. Outtz's counsel and set the cut score at 89 simply to limit the number of candidates selected for further processing. As the City admitted in *Horan,* the "cut score was not set by the City because it believed that

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great deference" by the court, *Albemarle,* 422, U.S. at 431—provide that "where cut-off scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force." 29 C.F.R. § 1607.5(H); *Bew,* 252 F.3d at 894 (using "the EEOC's standard" to determine propriety of cut score in Title VII case).

individuals who scored 89 or higher were the best qualified candidates for the job of firefighter." Rather, the cut-score was established for "administrative convenience."

Based on Dr. Outtz's uncontroverted testimony about the statistical properties of the 1995 Test, the court finds that the City has not presented sufficient evidence to justify its admittedly discriminatory decision to set the cut score for the 1995 Test at 89 points. The evidence in this case clearly showed that the City: (1) knew that a cut-off score of 89 would disproportionately exclude African-American applicants from the candidate pool; and (2) knew that the cut-off score was a statistically useless method of evaluating candidates. However, ignoring the statistical limitations of the 1995 Test, the City went ahead and applied the 89 cut-off score for reasons of "administrative convenience" even though less discriminatory, and equally convenient, selection methods were available and later employed (namely, selection of applicants at random from the pool of candidates who passed the 1995 Test). Those facts alone are fatal to the City's defense in this case and lead the court to find that defendant's selection methods are unlawful under Title VII.

C. Validity / Predictive Value Of The 1995 Test.

Even assuming that the 1995 Test reliably measured the four cognitive abilities that it was designed to measure (and ignoring the fact that the 89 cut-off score is statistically meaningless), the City's "business necessity" defense must fail because the City failed to prove that the 1995 Test, applied with a cut-off score of 89, can meaningfully distinguish

candidates who are qualified to perform the job of firefighter from those who are not qualified for that position. As the City conceded in *Horan*, there "is no evidence to support a finding that the top seven (7) percent of the candidates on the written portion of the 1995 entrance examination [*i.e.*, those who scored 89 or above on the 1995 Test] are the most qualified candidates for the job or that they are better qualified than individuals who obtained a score between 88 and 65 . . ." That admission accurately summarizes the fatal weakness of the City's position in this case.

The ability of the 1995 Test to predict firefighter performance is key to the City's Title VII defense. "The mere fact that a test 'is representative of important aspects of performance on the job' (as content validity requires) matters only because it is reasonable to suppose that such a test will usefully distinguish among candidates – in other words, that using the test in selection will likely lead to a better performing workforce." *Allen*, 2002 U.S. Dist. LEXIS 18973, at *10.

The evidence in this case does not support such a supposition. As the City admitted in *Horan*, there is no evidence that candidates with a score of 89 and above are more qualified than those who passed the exam but fell short of the 89 cut score. The City has hired hundreds of paramedics and veterans who scored below an 89 on the 1995 Test. Moreover, most of the cadets who graduated from the Academy in 2003 scored between a 65 and 88. The City has presented no evidence that those firefighters are any less qualified on any aspect of job performance than those who scored 89 or above on the exam. To the contrary, the City has admitted a lack of correlation between test

scores and job performance in the context of the 1995 Test's disparate impact on African-Americans; the City admitted in *Horan* that both the designer of the 1995 Test, Dr. Outtz, and several of the CFD's top officials concluded that "there are no measured differences in job performance between Blacks and whites in any rank in fire services despite measured differences on cognitive ability tests."

Plaintiffs' expert, Dr. Charles Cranny, convincingly articulated the City's problem in statistical parlance, explaining that the predictive value of the 1995 Test cannot be determined because there is no "correlated known value." Although the test scores are known, there is no actual evidence of a correlation between those test scores and job performance. According to Dr. Cranny, while the two variables could be plotted on a "scatter graph" and a regression line could be drawn to reflect a linear relationship between test scores and job performance, without evidence of a correlation between the two variables (called the correlation coefficient), the strength of the relationship between test scores and job performance cannot be determined.

The City has attempted to overcome the dearth of evidence in this case, and its fatal admissions in *Horan*, by arguing that: (1) even if the 1995 Test is not predictive of overall job performance, it is a valid measure of the "trainability" of cadets; and (2) while there is no data in this case linking test performance and job performance, the 1995 Test should nevertheless be found valid because there is always a strong correlation between the results of cognitive tests and subsequent job performance. The court is not convinced by either of the City's arguments.

In support of its argument that the 1995 Test is a valid measure of the "trainability" of candidate firefighters, the City offered the testimony of Chicago Fire Chief and Assistant Director of Training, Steve Chikerotis. Chief Chikerotis testified that, in his opinion, the 2002 class of cadets who entered the Academy with scores between 65 and 88 performed less well on weekly pencil and paper quizzes and needed more remedial work than prior cadet classes who entered the Academy with scores of 89 and above. The Chief's opinion on the relative "trainability" of cadets is based on his own observations of cadets training at the Academy.

The court finds that the City's evidence is insufficient to establish a relationship between test performance and the "trainability" of cadets. At the outset, the 1995 Test was not designed to measure skills related to trainability. In identifying the skills required of a Chicago firefighter, the designers of the 1995 Test focused exclusively on on-the-job observations. They did not conduct any observations of skills needed during training at the Academy. Moreover, while the court credits the testimony of Chief Chikerotis, the court finds that it is entitled to only modest weight. The court is uncomfortable relying on anecdotal evidence of training performance to prove an essential element of the City's defense, especially when the observations at the core of that anecdotal testimony occurred in the late stages of this litigation. In addition, Chief Chikerotis's testimony regarding cadets' performance on written exams did not provide a comprehensive picture of the cadets' training regimen. Chief Chikerotis made it clear that cadets are evaluated at the Academy on much more than their

performance on quizzes and tests. Among other criteria, cadets are evaluated on their ability to operate fire engines, to perform rescues from multiple story buildings and to work as a team. The Chief testified that these skills and many others are essential to the job of firefighter and that candidates who fail to master those skills, regardless of their ability on written tests, will not pass the Academy. Since the cadets' scores on written tests do not reflect how well the cadets mastered the myriad other skills required to pass the Academy, those scores alone are not convincing proof of the candidates' relative "trainability."[7]

In addition to its use of anecdotal evidence of the relative trainability of firefighter candidates, the City argues that the 1995 Test is valid for the simple reason that cognitive tests, as a general rule, are predictive of job performance. In essence, the City argues that the problem identified by Dr. Cranny (the lack of any correlation coefficient specific to the 1995 Test) can be overcome by borrowing correlation coefficients measured in other cognitive exams. The City's expert, Dr. Campion, testified that, although there is no data that links performance on the 1995 Test to job performance or "trainability," the City can rely on the correlation coefficients measured in other cognitive tests and use them to validate the 1995 Test regardless of whether those other tests measured any of the four cognitive skills that the 1995 Test was

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[7] Chief Chikerotis also testified that the Academy switched its curriculum in the Fall of 2002. That switch in curriculum may well have accounted, albeit to some entirely unknowable degree, for some of the variance in performance to which the Chief testified.

designed to measure. Dr. Campion's opinion is based on his review of 13 meta-analyses of general intelligence tests.[8] His resulting conclusion is that "cognitive abilities tend to correlate" in that "you can have widely different kinds of abilities, but yet they will correlate amongst each other in a reasonably representative sample of people." In other words, all cognitive tests are created equal and any well-designed cognitive test can be used to predict job performance.

While the court appreciates the value of meta-analysis to the field of industrial and organizational psychology in general, the court is not persuaded by the City's sweeping application of meta-analysis in this instance. Significantly, the City's broad conclusion that "all cognitive abilities correlate" is strikingly different from its admissions in the *Horan* case, where the City emphasized that cognitive skills are varied and distinguishable and that the results—and consequently the predictive value—of a cognitive test can vary depending on which skills are tested.[9] The testimony of plaintiffs' expert, Dr. Cranny, is consistent with the City's position in *Horan*, and the court finds the City's position in *Horan*, and not its argument here, more persuasive. Even accepting that there is *some* correlation between various tests of cognitive and mental abilities, that hardly establishes that those tests test substantially the same thing or are interchangeable.

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[8] A meta-analysis is a statistical analysis of the results of a collection of individual studies to integrate and summarize their results.

[9] Defendant's other expert, Dr. Outtz, was far more circumspect on this point than Dr. Campion, noting that cognitive abilities correlate only "for the most part" and sometimes do not.

The 1995 Test was unique. It was designed to measure only four specific cognitive abilities and included a heavily-weighted video demonstration section that was never piloted and was never used before or since. As discussed above, the unique structure of the 1995 Test was far from perfect and may have interfered with the 1995 Test's ability to measure some of the skills it was intended to measure. Yet, regardless of the 1995 Test's unique design and evident flaws, the City would have the court import data from other cognitive tests based on the simple conclusion that "all cognitive abilities correlate." The City asks the Court to reach this conclusion without evidence or analysis of whether the tests underlying the City's conclusions are comparable to the 1995 Test. Given the unique character of the test at issue here, and the lack of evidence of the nature of the tests on which the meta-analytic studies discussed by Dr. Campion were based, the court rejects the City's argument that those studies validate the 1995 Test.

D. Less Discriminatory Alternative.

The Court finds that the City did not carry its burden of proof in this case and, therefore, rules in favor of plaintiffs on their Title VII claim. However, even if the City had successfully proven that the disparate impact of its decisions was justified by business necessity—and thereby shifted the burden of proof back to plaintiffs—plaintiffs would still prevail in this case because the evidence clearly shows that an equally valid and less discriminatory alternative was available. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (describing burden shifting standard).

Quite simply, the City could have done what it is doing now: it could have randomly selected candidates

who passed the exam for further evaluation. Such an alternative would have been less discriminatory; although the 1995 Test would have had a disparate impact on African-American candidates regardless of the cut-off score, random selection of qualified candidates has indisputably lessened the disparate impact of the 1995 Test. Moreover, the new policy of random selection of qualified applicants is "equally valid" in that it is equally effective at serving the essential goal of the CFD, producing quality firefighters.[10] There is no indication that the shift in selection procedures caused a drop-off in the quality of firefighters produced by the Academy. As the City candidly admitted in *Horan*, there is no evidence that firefighters who scored between 65 and 89 are any less qualified than candidates who scored 89 or above.

The court finds that, from 1995 to 2001, the City used a hiring procedure that had a disparate impact on African-American candidates even though an equally valid, and less discriminatory, option was available. For that reason—even if the City had proven that its practice was justified by business necessity—plaintiffs are entitled to a ruling in their favor on the liability aspects of their Title VII claims.

CONCLUSION

The City admits that its use of the 1995 firefighter examination with a cut score of 89 had a disparate

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[10] The new random selection policy also serves the City's stated goal of "administrative convenience." With random selection from the pool of qualified candidates, the City, without further deliberation or administrative action, can meet its hiring goals without clogging the process with an unmanageable number of candidates.

impact on African-American applicants, and has failed to prove that its hiring procedures were job-related and consistent with business necessity. The court therefore concludes that the City's use of the 1995 Test with a cut-off score of 89 was a manifest violation of Title VII and enters judgment of liability against the City of Chicago and in favor of plaintiffs.

ENTER:

s/ Joan B. Gottschall
United States District Judge

DATED: March 22, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTHUR L. LEWIS, JR.; GREGORY S. FOSTER, ARTHUR C. CHARLESTON, III; PAMELA B. ADAMS; WILLIAM R. MUZZALL; PHILIPPE H. VICTOR; CRAWFORD M. SMITH; ALDRON R. REED; and AFRICAN AMERICAN FIRE FIGHTERS LEAGUE OF CHICAGO, INC.; individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF CHICAGO,

Defendant.

No. 98 C 5596.

Judge Joan B. Gottschall

Docketed May 26, 2000

MEMORANDUM OPINION AND ORDER

Plaintiffs, several African-American applicants for positions as firefighters with the Chicago Fire Department, have brought suit on behalf of themselves and all other African-American firefighter applicants who took and passed the City of Chicago's 1995 written firefighter examination. Plaintiffs allege that the examination had a disparate impact on African-

American applicants. Defendant, the City of Chicago, has moved for summary judgment, alleging that plaintiffs' suit is time-barred because they failed to file the required discrimination charges with the Equal Employment Opportunity Commission (EEOC) within the limitations period. Resolution of the City's motion turns on a single issue: Does the City's ongoing reliance on a discriminatory examination's results in making hiring decisions constitute a continuing violation of Title VII? Because the court believes that it does, the City's motion for summary judgment is denied.

Background

On July 26 and 27, 1995, the Chicago Fire Department administered the written component of the 1995 firefighter entrance examination to applicants for firefighter positions with the Department. More than 26,000 applicants—including each of the named plaintiffs—took the July 1995 written component.

In January 1996, the City sent "Firefighter Examination Final Score Notices" to all applicants, including the named plaintiffs. The City grouped the scores into categories: Applicants who scored at or above 89 on the examination were considered "well qualified" and were eligible to advance through the hiring process. Applicants who scored between 65 and 88 were considered "qualified"; and applicants who scored below 65 failed the examination. Neither the "qualified" applicants or those who failed the examination continued in the hiring process, with two exceptions: certain incumbent paramedics who were eligible pursuant to a collective bargaining agreement and veterans.

The examination scores of the eight named plaintiffs ranged from 70 to 87. On January 26, 1996, the City sent plaintiffs written notifications of their examination results. The form notification letter advised plaintiffs that:

> You have achieved a score of ____ out of a possible 100 on the written/video portion of Firefighter Examination # 39501. This means that you have been rated "Qualified" for the position of Firefighter. While this means you have passed the examination, you are not in the group of candidates who received a rating of "Well Qualified" on the examination. Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.
>
> If you recently moved or are planning to move, or have changed your name, you must notify the City of Chicago Department of Personnel in writing . . . . Failure to notify the City of Chicago Department of Personnel may result in the removal of your name from the eligibility list.
>
> . . . . ALL FUTURE COMMUNICATIONS YOU RECEIVE WILL BE FROM THE CHICAGO FIRE DEPARTMENT PERSONNEL DIVISION AND THE CITY OF

CHICAGO DEPARTMENT OF PERSONNEL.
KEEP THIS NOTICE FOR YOUR RECORDS!

(Exh. I to Pls.' Resp. to Mtn. for Summ. J.)

The form notification letter that the City sent to candidates who had failed the written examination advised:

> We regret to inform you that you did not achieve a passing score on Firefighter Examination # 39501. Your score was ____ out of a possible 100, which is below 65, the passing score for the examination. As a result, you will no longer be considered for this position. . . . THIS IS THE LAST COMMUNICATION YOU WILL RECEIVE REGARDING FIREFIGHTER EXAMINATION # 39501.

(Exh. J to Pls.' Resp. to Mtn. for Summ. J.)

On January 26, 1996, Mayor Richard Daley announced the examination results in a news release. The release contained a breakdown of the examination results by race, national origin and sex. According to the release, the "well qualified" group was 75.8 percent white and 24.2 percent minority, of which 11.5 percent were African-American. (Exh. 1 to Def.'s Mtn. for Summ. J.) The release reported that "[o]f the more than 26,000 people who took the test, 1782 (or 6.8 percent) have been deemed 'well-qualified' and each will be contacted by the city, in random order, for the next round of tests." (*Id.*) In the release, the Mayor acknowledged his concern with the results, stating that "[a]fter all our efforts to improve diversity, these test results are disappointing." (*Id.*)

Chicago's major newspapers, including the *Chicago Sun-Times*, *Chicago Tribune*, and *Chicago Defender*, reported the examination results and impact on minority applicants, as well as reaction and protests from applicants, firefighters, and members of the African-American community. Among these reports was a front-page article published by the *Chicago Sun-Times* on January 27, 1996 with the headline: "Fire, Police Exams Leave Racial Divide—Daley's Decision Angers Whites, Minorities Alike." (Exh. 2 to Def.'s Mtn. for Summ. J.) The article featured a graph titled "Fire Exam Finalists" that illustrated the racial breakdown in percentage terms of the exam takers and those in the "well qualified" category. (*Id.*) The article reported that "[s]ix hundred firefighters will be hired from the 'well-qualified' pool over the next three years." (*Id.*)

Around April 1996, representatives of plaintiff African American Fire Fighters League and a number of class members met with former lead counsel for plaintiffs, Judson Miner. Miner concluded from his meeting with plaintiffs that the type of lawsuit that they could bring would be an "adverse impact" lawsuit and that, assuming that the examination actually had an adverse impact on African-Americans, the case would largely turn on the "job relatedness" or "validity" of the examination. According to Miner, he could not determine whether the candidates had a possible claim without some information on the test and its validity. On November 6, 1996—after discussions with the City and the filing of a Freedom of Information Act request with the Chicago Fire Department—Miner was provided with a copy of the "final technical report prepared by the test consul-

tant," as well as "a copy of the appendices to the validation report" from the City's law department. (Exh. K to Pls.' Resp. to Mtn. for Summ. J.)

After receiving these materials, Miner retained a consulting expert to analyze the examination's validity. Over the next two months, the consultant requested additional information, which Miner obtained from the City and forwarded to the consultant. On March 15, 1997, Miner received a preliminary report from the consultant concluding that the examination had substantial adverse impact and was invalid. Miner then met with a number of the firefighter candidates and advised them that they had a possible disparate impact claim against the Chicago Fire Department.

Six of the eight named plaintiffs filed Charges of Discrimination with the EEOC: Crawford M. Smith filed on March 31, 1997; Aldron R. Reed filed on April 1, 1997; Gregory S. Foster, Jr. filed on April 14, 1997; Pamela Adams filed on April 14, 1997; Arthur C. Charleston, III filed on July 8, 1997; and William R. Muzzall filed on September 17, 1997. The EEOC issued right to sue letters on July 28, 1998. Arthur Lewis and Philippe Victor did not file charges of discrimination with the EEOC.

Plaintiffs filed this suit on September 9, 1998. The plaintiff class is now composed of over six thousand African-American firefighter candidates who took and passed the City's 1995 written examination. The City admits that the Chicago Fire Department has been processing firefighter candidates for hire from the "well qualified" pool of candidates on the firefighter eligibility list since approximately April 1996.

Analysis

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, it is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Plaintiffs may prove a violation of Title VII by demonstrating either that the City's failure to hire them was "disparate treatment" or that the procedures

by which the City has made its hiring decisions have a "disparate impact." Disparate treatment "occurs when a plaintiff is intentionally treated less favorably than others simply because of his race, color, religion, sex, or national origin." *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 513 (7th Cir. 1996). It requires plaintiffs to prove that the City acted with actual discriminatory intent. *Id.*

Establishing disparate impact, on the other hand, does not require a showing of discriminatory intent. Rather, a disparate impact "exists where a specified employment practice, although neutral on its face, has a disproportionately negative effect on members of a legally protected class." *Id.* The disparate impact theory may be utilized to challenge both objective and subjective hiring processes. *See id.* In challenging the City's use of the results from the 1995 written examination in its hiring of firefighters, plaintiffs' claims arise under the disparate impact theory of Title VII liability.

Regardless of a plaintiff's theory of discrimination, before bringing a suit for employment discrimination in federal court, the plaintiff must first file a discrimination charge with the EEOC. In Illinois, in order for the federal court action to be timely, the EEOC charge must be filed within 300 days after the allegedly discriminatory act occurred. 42 U.S.C. § 2000e-5(e)(1); *Koelsch v. Beltone Elec. Corp.*, 46 F.3d 705, 707 (7th Cir. 1995). "The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks*, 449 U.S. 250, 256-57

(1980).

The City argues that summary judgment is warranted because none of the named plaintiffs filed a timely charge of discrimination with the EEOC. According to the City, the alleged adverse action against plaintiffs occurred in January 1996, when they were notified of their placement by the City in the "qualified" category of candidates, rather than the "well qualified" category. The City argues that the January 1996 notification letters, the Mayor's news release and the Chicago media coverage provided notice to plaintiffs of the examination's alleged disparate impact on African-Americans. Because none of the plaintiffs filed EEOC charges until March 31, 1997—more than 420 days after they received notice—the City argues that plaintiffs failed to satisfy the administrative prerequisites to filing this suit.

In response, plaintiffs argue that the 300-day limitations period for filing their EEOC charges has not begun to run because the City's ongoing refusal to process plaintiffs' firefighter applications constitutes a continuing violation. According to plaintiffs, "The City's continued refusal to permit members of the plaintiff class to advance to the next stage of the hiring process is a systemic continuing violation because it is rooted in a discriminatory policy or practice." (Pls.' Resp. to Mtn. for Summ. J. at 5) The court agrees.

"The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period." *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992). In determining the timeliness of the plaintiff's claim, the court treats the linked acts as one continuous act that

ends within the limitations period. *Id.* The Seventh Circuit has discussed three viable continuing violation theories. The first theory "stems from 'cases, usually involving hiring or promotion practices, where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the violation occurred.'" *Id.* at 565 (quoting *Stewart v. CPC Int'l, Inc.*, 679 F.2d 117, 120 (7th Cir. 1982)). The second theory "stems from cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory." *Id.* (citing *Stewart*, 679 F.2d at 121). Such policies are also referred to as "systemic" continuing violations. *Id.* at 565 n. 5. The third theory "stems from cases in which 'the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy. . . . In such cases the challenged practice is evidenced only by a series of discrete, allegedly discriminatory, acts.'" *Id.* (quoting *Stewart*, 679 F.2d at 121).

The second continuing violation theory is the only one relevant here. Plaintiffs allege that the City has maintained an ongoing discriminatory policy by continuing to make hiring decisions based on the results of the discriminatory 1995 examination. While the Seventh Circuit has not spoken directly on this issue, this court believes that, based on relevant case law, the nature of plaintiffs' claims, and the proffered evidence construed in plaintiffs' favor, plaintiffs have established a continuing violation.[1]

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[1] The court rejects the City's assertion that "plaintiffs have not pleaded the continuing violation doctrine, nor have they set

In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Supreme Court addressed a continuing violation claim in determining the timeliness of an EEOC discrimination charge. Ricks, a college professor, was denied tenure, but was then given a one-year "terminal" contract by the college. In attempting to delay the accrual of his cause of action, Ricks argued that the college's conduct constituted a "continuing violation" of the civil rights laws because "discrimination motivated the College not only in denying him tenure, but also in terminating his employment" upon the expiration of his subsequent one-year contract. *Id.* at 257. As a result, according to Ricks, the limitations period did not begin to run until his one-year contract expired.

The Court initially observed that "[d]etermining the timeliness of Ricks' EEOC complaint, and this ensuing lawsuit, requires us to identify precisely the 'unlawful employment practice' of which he complains." *Id.* The Court found that Ricks' complaint did not support his continuing violation argument because it did not allege discriminatory conduct by the college after denying Ricks tenure. "If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or

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forth any factual basis supporting the applicability of the doctrine." (Def.'s Mtn. for Summ. J. at 10) Plaintiffs' EEOC charges list the date of the discrimination as "3/97 and continuing." (Exh. 3 to Def.'s Mtn. for Summ. J.) Further, plaintiffs' complaint alleges that the City "has used and continues to use" the results from the discriminatory examination (Compl. ¶ 1), that plaintiffs "have been and continue to be denied the opportunity" to be hired as firefighters (*Id.* ¶ 7), and that the City "has violated, and is continuing to violate" Title VII. (*Id.* ¶ 30)

occurred at the time of, the actual termination of his employment." *Id.*

The fact that Ricks did not feel the effect of the college's alleged discrimination until he was discharged was insufficient to postpone his claim's accrual. The *Ricks* Court recognized a crucial distinction between the present effects of a one-time violation and the continuation of the violation into the present:

> It appears that termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure. In order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure. But no suggestion has been made that Ricks was treated differently from other unsuccessful tenure aspirants. Rather, in accord with the College's practice, Ricks was offered a 1-year "terminal" contract, with explicit notice that his employment would end upon its expiration.
>
> In sum, the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure— the eventual loss of a teaching position—did not occur until later.

Id. at 257-58 (emphasis in original). The Court thus

concluded that "the limitations periods commenced to run when the tenure decision was made and Ricks was notified." *Id.* at 259.

Plaintiffs insist that "*Ricks* does not change the fact that the City's continued use of the results of its discriminatory exam is a continuing violation" because the case merely "stands for the proposition that a plaintiff may not rely on the continuing violation theory to advance claims about an isolated, past instance of discrimination, even though the effects persist into the present." (Pls.' Resp. to Mtn. for Summ. J. at 8-9) The cases cited by plaintiffs in their effort to distinguish *Ricks* highlight the difficulty in discerning whether an injury stems from an ongoing pattern or policy of discrimination, or whether it merely reflects the impact of a single, time-barred discriminatory act.

In *Palmer v. Board of Educ.*, 46 F.3d 682, 683 (7th Cir. 1995), a class of African-American parents and children sued their school board for racial discrimination, alleging that the board closed a junior high in University Park –a predominately African-American town—because white residents did not want to send their children there. The board claimed that the closing was temporary, until renovations could be completed. *Id.* The plaintiffs pointed out that renovations had yet to be scheduled, and the school remained closed. *Id.*

The Seventh Circuit rejected the school board's statute of limitations argument, ruling that "a claim of racial discrimination arises each day a child is assigned to school under a racially discriminatory policy." *Id.* The court distinguished *Ricks* as involving

a single discriminatory act, rather than "[a] series of wrongful acts," which "creates a series of claims." *Id.* at 686. The court reasoned:

> A public employer that applies different salary schedules to black and white employees commits a new wrong every pay period, and the fact that the employer has been violating the Constitution for a generation does not permit it to commit fresh violations. . . . Just so here. Every fall the school board decides which buildings to use and which children shall be assigned to which schools. If, as plaintiffs believe, the school board's explanation for closing Deer Creek is a pretext for discrimination, then each year's decision to leave the building shuttered is a new violation—as is each assignment plan that compels black pupils to board busses for a distant junior high school that they would not be required to attend if the population of University Park had a lighter complexion.

Id. (citations omitted).

Similarly, in *Webb v. Indiana Nat'l Bank*, 931 F.2d 434, 436 (7th Cir. 1991), the court acknowledged the uncontroversial notion that "[f]oreknowledge [of an injury] does not set the statute of limitations running." The court recognized that in *Ricks*, the injury was the denial of tenure, but that "[t]he statute of limitations would not have begun to run when Ricks was told (if he had been told) that he would be denied tenure at the next faculty meeting, because that would have been a prediction of injury, not the injury itself." *Id.* The *Ricks* Court did not abolish the principle that "in

the case of a continuing unlawful practice, every day that the practice continues is a fresh wrong for purposes of the statute of limitations." *Id.* at 438.

The Seventh Circuit's analyses in *Palmer* and *Webb*—viewed against the background of *Ricks*—clarify the continuous injury inquiry in this case. The determination as to whether the continuous injury theory applies boils down to one question: Has the City engaged in a continuing unlawful practice toward plaintiffs? According to plaintiffs, the City has done so by continuing to base its hiring decisions on the results of the discriminatory examination.

At first glance, this notion – that an employer's reliance on results generated by a discriminatory examination constitutes ongoing discrimination – appears to have been rejected by the Seventh Circuit. In *Huels v. Exxon Coal USA, Inc.*, 121 F.3d 1047, 1048 (7th Cir. 1997), Huels claimed that his employer, Exxon, discriminated against him based on his alcoholism in violation of the Americans with Disabilities Act. Huels alleged that Exxon ranked him dead last in job performance because Huels had sought alcohol treatment, not because of his job performance. *Id.* Based on Huels' position on the job performance list, Exxon laid him off, then failed to recall him when it asked many of its other laid-off workers back. In attempting to defeat Exxon's statute of limitations argument, Huels argued that Exxon's conduct amounted to a continuing violation of the ADA. According to Huels, each employment decision amounted to a fresh act of discrimination by Exxon. *See id.* at 1049.

The Seventh Circuit disagreed, finding that any

claim based on Huels' "allegedly discriminatory position on the list would have accrued when he was assigned that ranking." *Id.* at 1050. The court reviewed cases in which courts held that employees' discrimination claims accrued at the time of their loss of seniority, rather than when they felt the consequences of the loss of seniority. *See id.* at 1050-51 (discussing *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Kennedy v. Chemical Waste Management, Inc.*, 79 F.3d 49 (7th Cir. 1996)). The court held that the same reasoning applied to Huels' claim:

> In each case, an employer committed a single dispositive (and allegedly discriminatory) act — it assigned certain employees poor positions on relative seniority lists. And although those employees only felt the most painful consequences of the employer's conduct down the road (when the lists were used in a nondiscriminatory manner to fire or demote employees), their claims accrued when the discriminatory act was committed. . . . We see no compelling reason to treat the neutral application of an allegedly discriminatory employee-ranking list compiled using performance evaluations differently from a list based upon relative seniority. As a result, even though Huels' low ranking was not a "certain prelude" to being laid off and then not being recalled, his claim—to the extent he ever had one—accrued when he, like the plaintiffs in *Lorance* and *Kennedy*, was assigned an allegedly discriminatory position on the ranking list.

Id. at 1051 (citations omitted).

Despite this seemingly relevant language, the court believes that the City's reliance on *Huels* is misplaced. Huels alleged that Exxon discriminated against him by giving him a poor performance ranking based on his alcoholism. Exxon's subsequent use of that ranking—in conjunction with the other employees' non-discriminatory rankings—did not amount to a separate act of discrimination against Huels. Further, Huels did not allege that he was injured as a result of a discriminatory Exxon policy. Huels did not allege that Exxon's ranking system was discriminatory, nor that Exxon's reliance on that ranking system constituted discrimination. Because Huels' claim centered on his individualized treatment by Exxon, it accrued at the time of that individualized treatment—not when Huels felt the effects of that treatment pursuant to a neutral, generalized, and unchallenged lay-off and rehiring policy.

Here, by contrast, plaintiffs are not alleging any individualized adverse treatment by the City. Rather, they allege that the 1995 examination had a disparate impact on African-American firefighter candidates, and that the City's reliance on the examination's results continues to have a disparate impact on African-American candidates. The City cannot simply explain away the disparate impact of the hiring process as "the present consequences of a one-time past violation." (Def.'s Reply at 8) If plaintiffs establish that the City's examination had a disparate impact on African-American candidates, then the City's ongoing use of the examination's results—rather than some other, non-discriminatory criteria for candidate selection—has the same disparate impact.

The City's motion for summary judgment is

premised on the notion that, in analyzing a disparate impact claim based on an employment examination, the disparate impact reflected in the examination results can be separated from the disparate impact arising from the employer's use of those results. This notion is not supported by logic or case law. In *Guardians Ass'n v. Civil Service Comm'n*, 633 F.2d 232, 235 (2d Cir. 1980), *aff'd*, 463 U.S. 582 (1983), black and Hispanic police officers challenged the written examinations used in making appointments to the New York City Police Department, alleging that the examinations had a racially disparate impact. The officers did not file suit until New York City laid off over 2,500 officers pursuant to the police department's "last-hired, first-fired" policy. *Id.* The officers alleged that, if not for the discriminatory entry-level examinations, they "would have been hired earlier and thus would have accrued sufficient seniority to withstand being fired." *Id.* at 236. The defendants argued, as the City does here, that the utilization of the examination-based eligibility lists was "merely the non-actionable perpetuation of the effects of past" discrimination. *Id.* at 249. The court rejected this argument, holding that:

> By utilizing the tainted test results for years after becoming subject to the commands of Title VII, defendants continued a course of discriminatory conduct that had indeed begun before the effective date of the Act but did not cease until defendants abandoned the practice of making hiring decisions in this manner. Even if the unjustified refusals to hire did not comprise the core of defendants' discriminatory conduct, at the very least they represen-

> ted the culmination of a continuously maintained illegal employment policy.

Id.. Similarly, in *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1980), the Fifth Circuit held that the employee's EEOC charge was timely if his employer, within the limitations period, "continued to base its selection of employees to receive job opportunities upon scores from an unvalidated battery of tests."

The City unjustifiably downplays *Guardians* and *Gonzalez* by pointing out that both decisions predate the Supreme Court's decision in *Ricks*. This court does not interpret *Ricks* as calling into question—much less repudiating—the approaches taken by the *Guardians* and *Gonzalez* courts. As discussed above, the *Ricks* Court held that an employee's disparate treatment claim accrued at the time of his discriminatory treatment, not at the time he felt the effect of that treatment. *Ricks* has not been interpreted as establishing that a disparate impact claim accrues at the genesis of the policy giving rise to the disparate impact, regardless of how long that policy is perpetuated. The fact that the City has overstated the demise of *Guardians* and *Gonzalez* is underscored by the fact that the decisions continue to be cited favorably in the wake of *Ricks*. *See, e.g., Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 658 (11th Cir. 1993) (applying *Gonzalez'* s continuing violation analysis); *United States E.E.O.C. v. City of Chicago*, No. 85 C 7281, 1989 WL 134788, at *5 (N.D. Ill. Oct. 13, 1989) (citing *Guardians* favorably).

As noted, the Seventh Circuit has yet to speak directly on the particular issue raised by the City's

motion. In a factually analogous case, Judge Will rejected an argument similar to the one raised here by the City. In *United States E.E.O.C. v. City of Chicago*, the EEOC sued the City for violating the Age Discrimination in Employment Act by refusing to hire or take applications for police officer positions from anyone age thirty-five or older. *See id.* at *1. Judge Will held that "[a] roster created from a discriminatory exam, and used for purposes of hiring, constitutes a continuing violation over the entire period of its use." *Id.* at *6. He reasoned that:

> If there was discrimination in these claimants' exclusion from the exam, that discrimination did not occur only when the roster was posted. It did occur then, but it also continued to occur for as long as the roster barred the claimants from an opportunity to be hired. Each decision to hire from the roster perpetuated any violation begun by their initial exclusion and made it an act of present discrimination.

Id.

Judge Will's reasoning is not rendered inapplicable to this case merely because the City's age-35 policy was facially discriminatory, whereas the City's reliance on the 1995 examination results is facially neutral. Such a distinction may be dispositive where the employee's claim is based on disparate treatment, but not where it is based on disparate impact. *See Vitug*, 88 F.3d at 513 ("A disparate impact exists where a specified employment practice, although neutral on its face, has a disproportionately negative effect on members of a legally protected class.").

Judge Plunkett took a different path in

determining the timeliness of the plaintiffs' claims in *In re Matter of Chicago Police Officer Promotions*, No. 91 C 668, 1993 WL 322834 (N.D. Ill. Aug. 23, 1993). In that case, white candidates for detective promotions alleged that they were intentionally excluded from the promotions list because of their race. *Id.* at *2. In order to qualify for the oral boards, the City required that white candidates achieve a higher minimum score on a written examination than the score required of minority candidates. *Id.* at *1. The results from the oral boards, in combination with the written examination results, were used to compose the promotions list. *Id.* at *2. Based on *Ricks*, Judge Plunkett concluded that:

> [T]he discriminatory act with respect to Plaintiff's eligibility for promotion was the July 1990 compiling of the 1990 detective's promotions list, for it was not until this time that the Plaintiffs could be certain that the oral boards, from which they were excluded based on their race, would be used in future promotion decisions (or, put another way, that they would be denied promotions based on their race). Denial of the . . . promotions in 1992 is but a later effect of Plaintiffs' earlier exclusion from the 1990 list.

Id. at *6. In finding that the plaintiffs' claims were untimely, Judge Plunkett echoed the principle set forth in *Ricks* that "the clock starts to run when the discriminatory act takes place, not when the plaintiff is affected by it." *Id.* at *7; *see also Kuan v. City of Chicago*, 563 F. Supp. 255, 256-57 (N.D. Ill. 1983) (holding that, where plaintiff alleged that he received a discriminatory performance evaluation, his claim

accrued at the time of the evaluation, not when the evaluation was later used as part of a promotion examination).

Regardless of whether Judge Plunkett's approach can be harmonized with Judge Will's, Judge Plunkett's approach is not inconsistent with finding a continuing violation in this case. The plaintiffs in *Chicago Police Officer Promotions* alleged that they were intentionally discriminated against because of their race. 1993 WL 322834, at *2. Their only allegation that could have amounted to intentional discrimination was the City's decision effectively to exclude them from the promotions list by requiring a higher score from them on the written examination. The City's subsequent use of the promotions list was not a new instance of intentional discrimination. There is nothing in Judge Plunkett's analysis, however, to suggest that the use of a promotion roster or candidate rankings could not amount to an ongoing discriminatory policy where the nature of the discrimination alleged is that the use has a disparate impact on a protected class of candidates.

The other cases relied on by the City do not alter the court's conclusion. In *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 903 (1989), three women who worked as testers for AT & T alleged that an alteration to the rules governing tester seniority was designed to protect incumbent male testers and to discourage women from promoting into tester positions. Significantly, the Court observed that the plaintiffs' "allegation of a disparate impact on men and women would ordinarily suffice to state a claim" under Title VII, but that Title VII affords seniority systems special treatment. *Id.* at 904; *see* 42 U.S.C. § 2000e-2(h) (providing that employment differences arising

from operation of seniority system are unlawful only if they are a result of intentional discrimination). The Court went on to hold that when an employer's "seniority system is nondiscriminatory in form and application, it is the allegedly discriminatory *adoption* which triggers the limitations period." 490 U.S. at 911 (emphasis in original).

The City correctly points out that, although *Lorance*'s specific holding has been abrogated by statute, *see* 42 U.S.C. § 2000e-5(e)(2) (allowing employees injured by application of intentionally discriminatory seniority system to measure limitations period from date of that application), the Seventh Circuit has recognized that *Lorance*' s "reasoning remains persuasive outside of the Title VII/intentionally discriminatory seniority system context." *Huels*, 121 F.3d at 1050 n.1. Nevertheless, the court does not believe that the Seventh Circuit's embrace of *Lorance*'s reasoning can—without further guidance from the court—be construed as a blanket rejection of the continuing violation theory as applied to an employer's ongoing use of rankings generated by a discriminatory examination.

In *Kennedy v. Chemical Waste Mgmt., Inc.*, 79 F.3d 49 (7th Cir. 1996), the court held that the statute of limitations began to run on an employee's adverse treatment claim at the time he was deprived of seniority, not at the time he was laid off as a result of that deprivation. The court reasoned that:

> Seniority is an important employee benefit because, like academic tenure, which it resembles, it provides job protection. Its deprivation is an injury that sets the statute of limitations

> running . . . even though the injury is contingent rather than actual unless and until job protection is needed.

Id., at 50 (citing *Ricks*). *Kennedy*'s analysis does not bear on the statute of limitations inquiry in this case because plaintiffs' claims are based not on the single deprivation of an employment benefit or opportunity, but on a continuing policy that has a disparate impact on African-American firefighter candidates. The disparate impact is not limited to the initial promulgation of the examination results, but arises every time the City decides to hire based on the results of the discriminatory examination.

A factual pattern more similar to this case is presented by *Bronze Shields, Inc. v. New Jersey Dep't of Civil Service*, 667 F.2d 1074, 1077-78 (3d Cir. 1981), in which the plaintiffs alleged that the eligibility roster used to hire Newark police officers was racially discriminatory because the written examination on which it was based had a disparate impact on minorities. Once plaintiffs were notified that they were not on the roster, they "knew they would not be hired by the Newark police department for the next three years because they were not on the eligibility roster." *Id.* at 1083. The Third Circuit rejected plaintiffs' argument that Newark continued to discriminate against them by continuing to use the eligibility roster. First, the court observed that "Newark never used the list prior to plaintiffs' filing charges with the EEOC." *Id.* On this basis, the court distinguished *Guardians*, noting that "had Newark used the list and hired recruits within 180 days before plaintiffs filed, their filings would have been timely." *Id.* at 1083 n.23. Second, the court found that, "even if Newark had

used the list, plaintiffs do not allege that Newark would have followed anything but a neutral, non-discriminatory procedure in hiring from the list." *Id.* at 1083.

To the extent that the *Bronze Shields* holding is based on Newark's failure to use the eligibility roster after its promulgation, its reasoning does not apply to this case. The City admits that "the Chicago Fire Department has been processing firefighter candidates for hire from the well-qualified pool of candidates on the firefighter eligibility list since approximately April 1996." (Def.'s Resp. to Pls.' Rule 56.1(b)(3)(B) Statement of Additional Facts ¶ 7)

However, to the extent that the *Bronze Shields* holding is based on the fact that Newark neutrally applied rankings generated by a discriminatory examination, this court declines to follow it.[2] The *Bronze Shields* court followed the *Ricks* analysis, finding that "Newark's non-discriminatory policy as to the use of the roster is similar to Delaware State's non-

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[2] Judge Will found *Bronze Shields* similarly unhelpful in *United States E.E.O.C. v. City of Chicago*, 1989 WL 134788. Judge Will first factually distinguished the case before him from *Bronze Shields*, observing that the City had already relied on the discriminatory age-35 roster to hire police recruits by the time the claimants filed charges, whereas Newark's roster had not been used at the time charges were filed. *See id.* at *5. He went on to find that the Third Circuit's reliance on *Ricks* was misplaced because "the holding in *Ricks* does not apply to cases where the allegations charge a continuing policy and practice of discrimination rather than just isolated instances of it." *Id.* Finally, Judge Will concluded that the *Bronze Shields* court reached "a result not compelled by any prior Third Circuit or Supreme Court precedent," and one which is "inconsistent with the purposes of the ADEA." *Id.* at *6.

discriminatory policy in discharging all faculty denied tenure." *Id.* at 1084. In drawing this analogy, the Third Circuit overlooked the fundamentally different natures of the discrimination alleged in the two cases. In *Ricks*, the discrimination consisted of the college's racially motivated rejection of Ricks' bid for tenure. Once tenure was denied, the college did not further discriminate against Ricks, but simply treated him as it did any other professor denied tenure—granting him a one-year terminal contract, then discharging him.

By contrast, in *Bronze Shields*, the discrimination occurred not because minority police officer candidates were required to take an examination that had a disparate impact on them, but because Newark's subsequent use of the examination's results in hiring police officers had a disparate impact on minority candidates. If Newark had jettisoned the tainted results and substituted some other employment criteria before beginning the hiring process, there would have been no actionable discrimination—regardless of the timing of the plaintiffs' EEOC filings. Because the claims brought by plaintiffs here and in *Bronze Shields* centered on the disparate impact arising from the cities' *use* of the examinations' results, Title VII was violated for as long as the cities continued using those results.

Conclusion

The court concludes that, if plaintiffs establish that the 1995 written examination used in the City's firefighter selection process had an unlawful disparate impact on African-American candidates, then the City's ongoing reliance on those results constitutes a continuing violation of Title VII. In light of this

conclusion, the court need not address the other arguments raised by plaintiffs in opposition to the City's motion for summary judgment based on the statute of limitations. Pursuant to the continuing violation doctrine, the court finds that plaintiffs' EEOC charges were timely, and that, as a result, this suit is not time-barred. Accordingly, the City's motion for summary judgment is denied.

ENTER:

s/ JOAN B. GOTTSCHALL
United States District Judge

DATED: May 25, 2000

United States Court of Appeals,

Seventh Circuit.

Arthur L. LEWIS, Jr., et al., Plaintiffs-Appellees,

v.

CITY OF CHICAGO, Defendant-Appellant.

No. 07-2052.

August 21, 2008.

ORDER

On July 3, 2008, plaintiffs-appellees filed a petition for rehearing and petition for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*.*

* Circuit Judges Joel M. Flaum and Ilana Diamond Rovner did not take part in the consideration of this matter.

OPPOSITION BRIEF

No. 08-974

Supreme Court, U.S.
FILED
APR 10 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ARTHUR L. LEWIS, JR.; GREGORY S. FOSTER, JR.; ARTHUR C. CHARLESTON, III; PAMELA B. ADAMS; WILLIAM R. MUZZALL; PHILIPPE H. VICTOR; CRAWFORD M. SMITH; ALDRON R. REED; and AFRICAN AMERICAN FIRE FIGHTERS LEAGUE OF CHICAGO, INC., individually, and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the limitations period on a Title VII claim for disparate impact from an examination and eligibility list created based on the examination results starts to run only when the list is adopted and announced, or also later, upon each use of the same list.

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IN THE

Supreme Court of the United States

No. 08-974

ARTHUR L. LEWIS, JR.; GREGORY S. FOSTER, JR.; ARTHUR C. CHARLESTON, III; PAMELA B. ADAMS; WILLIAM R. MUZZALL; PHILIPPE H. VICTOR; CRAWFORD M. SMITH; ALDRON R. REED; and AFRICAN AMERICAN FIRE FIGHTERS LEAGUE OF CHICAGO, INC., individually, and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

A. Factual Background

The City of Chicago follows a multi-step process to hire firefighters. The first step is a written examination, and applicants become eligible for further processing based on their examination scores. Supp. R. 436, Ex. 1. Thereafter, as the needs of the Chicago

Fire Department ("CFD") dictate, candidates are called for a physical abilities test, background check, medical evaluation, and drug test; those who pass each step receive fire academy training; and graduates go into the field for a probationary period. *Ibid.* The City hired consultants, including Dr. James Outtz, an expert on reducing disparate impact in testing, to analyze the firefighter position and create a new written examination. *Ibid.* Developing the examination took years, and it was administered for the first, and only time in July 1995 to some 26,000 applicants. *Id.* at Aff. ¶4. The City scored the tests, listed applicants from highest to lowest score, and divided the list into three categories. *Id.* at Aff. ¶5. The first category included those scoring 89 or above; the second included those scoring 88 to 65; the third included those scoring 64 or below; and the categories were deemed "well qualified," "qualified," and "not qualified," respectively. *Ibid.*

On January 26, 1996, after the hiring eligibility list was adopted, the City mailed notices informing each applicant of their score and category, and what would happen for that category. Supp. R. 436, Aff. ¶¶5-8, Ex. 1. Those "well qualified" were told they passed and would be called in random order to continue the hiring process, based on CFD's needs. *Id.* at Aff. ¶5. Those "qualified" were told they passed but would "not likely" be called due to the "large number of candidates who received higher scores." *Ibid.* They were also told they would remain "on the eligible list" for "as long as that list is used" because it was "not possible to predict how many" would be hired from the "well qualified" category over the "next few years." *Ibid.* Those "not qualified" were told they failed and would not be called. *Ibid.*

That same day, the City's Mayor publicly announced the examination results in a news release. Supp. R. 436, Ex. 1. He noted that 1,782, or 6.8%, of applicants were deemed "well qualified"; and of those, 75.8% were white and 11.5% African-American. *Id.* at 2. He stated that those "well qualified" would be called in random order to continue the hiring process and the City expected to hire about 600 from that category over the next three years. *Ibid.* He added that "[a]fter all our efforts to improve diversity, these test results are disappointing" (*id.* at 1), and although he "was not satisfied with the results, in fairness to" those who scored higher, the eligibility list would be used while the City studied "new procedures" for hiring (*id.* at 2). For weeks, major Chicago newspapers – the *Chicago Sun-Times*, *Chicago Tribune*, and *Chicago Defender* (popular in the African-American community) – regularly reported on the examination's impact on minorities, and the reactions of applicants, firefighters, and minority leaders. *Id.* at Ex. 2.

Months later, in April 1996, the African American Fire Fighters League of Chicago, Inc. ("AAFFLC"), along with some petitioners, met with an attorney to discuss whether they "had a possible lawsuit" based on the examination. R. 74, Ex. K ¶1. They mentioned the score notices and "[r]ecent newspaper articles" about the examination's "adverse impact" on African-Americans. *Ibid.* Counsel told them they had a possible "adverse impact" claim but he wanted to explore potential defenses the City could raise. *Id.* at ¶2. In the following months, counsel gathered information he believed was needed; once he had satisfied himself, he advised them about the "possible adverse impact" claim. *Id.* at Exs. A-B, K ¶¶3-9, L; R. 83, Aff. ¶¶3-8, Ex. 1. With counsel's assistance (R.

74, Ex. K ¶10), the earliest charge was filed with the EEOC by a named petitioner on March 31, 1997 (Supp. R. 436, Ex. 3). The charge claimed that the "hiring procedures, including" the examination, "discriminated against African Americans," and that the "most recent" violation had occurred in March 1997 and was "continuing." *Ibid.* Nearly 16 months later, the EEOC issued a right-to-sue letter. *Id.* at Ex. 4.

Meanwhile, based on CFD's hiring needs, the City used the eligibility list for the first time in May 1996; the second time in October 1996; and eight more times until November 2001, each time calling from the "well qualified" category in random order. R. 163 at 9; R. 233, Ex. A at 5; Supp. R. 436, Exs. 1-2.[1]

B. District Court Proceedings

Within 90 days of the right-to-sue letter, the eight named petitioners and the AAFFLC filed suit against the City, claiming that the examination and decision to call only "well qualified" applicants had disparate impact under Title VII. Supp. R. 432. The district court certified a class of about 6,000 African-Americans in the "qualified" category who would "not likely" be called, or at least not for many years. R. 58-59. Answering the complaint, the City admitted adverse impact but raised defenses, including the statute of limitations. R. 11, 163, 171-74, 188.

The City sought summary judgment, arguing that the claim was untimely because no EEOC charge was

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[1] Ultimately, the City used this list longer than expected because new hiring procedures had not been finalized. The "well qualified" category was exhausted in November 2001, after which the City began drawing from the "qualified" category in random order. The City stopped using the list altogether in 2007, after new procedures were adopted.

filed within 300 days after the alleged unlawful employment practice occurred, which was when the list was adopted and announced. R. 83; Supp. R. 433, 436. Petitioners defended the claim's timeliness under multiple theories, including that the continuing violation doctrine applied; that they did not receive definite notice of their injury; and that the limitations period should be equitably tolled. R. 74. Framing the question as whether "the City's ongoing reliance on a discriminatory examination's results in making hiring decisions constitute[s] a continuing violation of Title VII" (Pet. App. 45a), the district court answered in the affirmative and denied the City's motion (*id.* at 44a-70a). A bifurcated bench trial was held; because the City had admitted adverse impact, the liability trial focused on the defenses that the examination was job related and its use was consistent with business necessity; the court rejected the defenses and found the City liable under Title VII. *Id.* at 12a-43a.[2] Two years later, the court granted relief and entered judgment. R. 390-91, 404-06.

Throughout the proceedings, the City continued to argue that the claim was time barred (R. 233, 244, 258, 260, 268, 301-02, 304-05, 308, 310), but the district court declined to alter its ruling (R. 259, 269, 273-74). The City appealed (R. 407), and the district court stayed the judgment pending appeal (R. 424-

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[2] Petitioners highlight some of the district court's liability findings (Pet. 8 n.3) but omit that Dr. Outtz issued a report after the examination was scored finding that it was valid and job related (R. 189, Ex. B). They also fail to mention the City's determination that calling only those in the "well qualified" category was justified by business necessity (Tr. Vols. 15-16) and that there were operational and administrative reasons for using the cut-off score of 89 (R. 274 at 9, 19-20).

25), specifically noting that this Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), made its decision on this question "less clear" (R. 425 at 3).

C. Seventh Circuit Proceedings

The sole issue the City raised on appeal was whether petitioners' claim was untimely. As we explained, no EEOC charge was filed within 300 days after the unlawful employment practice occurred, which was when the hiring eligibility list was adopted and announced; and neither the continuing violation doctrine nor equitable tolling applied. Petitioners modified their response, arguing that a new violation occurred each time the list was used, making the EEOC charge timely to challenge the list's second use; that it was timely even as to the first use under the continuing violation doctrine; and that equitable tolling applied. Moreover, for the first time in the decade-long litigation, petitioners offered a disparate-treatment theory and urged application of equitable estoppel. The City replied to petitioners' arguments, including the newly-raised ones.

The Seventh Circuit, in an opinion authored by Judge Posner and joined by Chief Judge Easterbrook and Judge Bauer, reversed. Pet. App. 1a-11a. The court reviewed the relevant precedents of this Court and noted some disharmony in the courts of appeals. *Id.* at 3a-9a. The court held that petitioners' claim was time barred because they failed to file an EEOC charge within 300 days after the unlawful practice occurred, which was when the list was adopted and announced. *Id.* at 3a-9a. That is when petitioners were injured – indeed, they "were injured, and their claim accrued, when they were placed in the 'qualified' category of the hiring list on the basis of their

score in the firefighters' test; for that categorization delayed indefinitely their being hired." *Id.* at 9a. There was "only one wrongful act" – the "classification" of petitioners "as merely 'qualified' on the basis of a test that they contend was discriminatory." *Id.* at 7a (quotation omitted). Each use of the list after that was nothing more than an "automatic consequence" of the examination and list, not a "fresh act of discrimination." *Id.* at 4a; see *id.* at 6a, 7a.

As the court explained, this is the "acknowledge[d]" rule "in a 'disparate treatment' case" – where a claim accrues when the "discriminatory decision is made" and communicated "rather than when it is executed." Pet. App. 3a. The court saw no basis for applying a different rule "to a disparate-impact case," particularly because these are simply methods of proving a discrimination claim. *Id.* at 5a-6a. And because this case did not involve a facially-discriminatory policy, the court put the unique accrual rule that applies in those cases – where each act taken pursuant to such a policy is a fresh violation – to the side. *Id.* at 4a-5a. The court also rejected petitioners' bids under the continuing violation (*id.* at 7a-9a) and equitable tolling (*id.* at 7a, 9a-11a) doctrines, and gave no moment to their waived arguments.

Petitioners sought rehearing *en banc*, but there were no votes for that. Pet. App. 71a.

REASONS FOR DENYING THE PETITION

After administering and scoring a written examination, the City adopted an eligibility list that limited the pool of applicants who would be called to continue the hiring process. The City would call only those in the "well qualified" category in random order for the next several years, as CFD's needs required.

That decision was communicated to all applicants, including petitioners, but no EEOC charge was filed for 420 days, despite Title VII's applicable 300-day limitations period. Nor did petitioners file within 300 days of the first use of the list. Petitioners finally filed about five months after the list's second use. The Seventh Circuit held that the claim accrued when the list was adopted and announced, rendering their filing untimely. After all, the list was adopted only once, in a single, discrete act, and no discriminatory act occurred after that. The subsequent uses of the list were merely the inevitable effects of its adoption.

Review of that decision is unnecessary. The Seventh Circuit faithfully applied the entire line of this Court's relevant precedents, and reached the correct result. Not only that, but the conflict in the courts of appeals is shallow and stale – on the precise question presented, the split is only two to two, and the two favoring petitioners have not been rethought for nearly three decades. Since then, this Court has decided at least six relevant cases. Given the developments in the law, particularly the trend toward the Seventh Circuit's view, the conflict will likely resolve itself.

I. The Seventh Circuit Faithfully Applied This Court's Entire Line Of Relevant Precedents To The Particular Facts Of This Case.

The paramount reason review is unnecessary is that the Seventh Circuit's decision on the question presented is correct. The question is whether, to preserve a Title VII claim that a hiring examination, and eligibility list created from the examination results and intended to be used as needed for several

years, had disparate impact, a plaintiff must file an EEOC charge within 300 days after the list was adopted and announced, or whether a plaintiff may wait and file a charge after any subsequent use of the list. The Seventh Circuit faithfully considered the entire line of this Court's precedents related to this question. That long line began with *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); included *Delaware State College v. Ricks*, 449 U.S. 250 (1980), *Chardon v. Fernandez*, 454 U.S. 6 (1981) (per curiam), *Bazemore v. Friday*, 478 U.S. 385 (1986), *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); and culminated last term in *Ledbetter*. In doing so, the Seventh Circuit ruled that petitioners' claim was time barred because it accrued only upon the list's adoption and announcement, for no unlawful practice occurred after that. Pet. App. 1a-11a. As we now explain, the court applied these cases correctly to this context.

Among other things, it is an "unlawful employment practice" for an employer to discriminate against any individual in making hiring decisions "because of" the person's "race." 42 U.S.C. § 2000e-2(a). Relevant here, anyone seeking to challenge a hiring decision under Title VII must first file a charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred." *Id.* § 2000e-5(e)(1). If no timely charge is filed, then a plaintiff "may not challenge the practice in court" and the claim must be dismissed. *Ledbetter*, 550 U.S. at 624.

As the Court's precedents teach, to determine when a Title VII claim accrues, and thus when the 300-day filing period starts running, the "specific employment practice that is at issue" must be identified "with

care" (*Ledbetter*, 550 U.S. at 624; accord *Morgan*, 536 U.S. at 110-11; *Lorance*, 490 U.S. at 904; *Ricks*, 449 U.S. at 257), and then it must be determined when that practice "occurred" (42 U.S.C. § 2000e-5(e)(1)), which simply means when it "happened" (*Morgan*, 536 U.S. at 109-10 & n.5), and was "communicated" (*Ricks*, 449 U.S. at 258). Such practices have been characterized in the Court's cases as either a "discrete act" that "occurs at a particular point in time" (*Ledbetter*, 550 U.S. at 621), like "termination, failure to promote, denial of transfer, or refusal to hire" (*Morgan*, 536 U.S. at 114); a series of acts for which the violation is not known until the acts are repeated over time, like a hostile work environment (*id.* at 115); or an act taken pursuant to a facially-discriminatory policy (*Ledbetter*, 550 U.S. at 634-36 & n.5 (discussing *Bazemore*, 478 U.S. at 389-91)).

These classifications are illustrated by the Court's cases. For starters, in *Evans*, a newlywed was forced to resign due to her employer's policy of excluding married female flight attendants. 431 U.S. at 554-55. She was rehired after the policy was changed, but her seniority was calculated based on her rehiring, rather than her original hiring, date. *Id.* at 554-55. Only after that did she file an EEOC charge and a lawsuit claiming sex discrimination. *Id.* at 554-56. While recognizing that using the rehiring date perpetuated the prior discriminatory act, the Court ruled the claim was untimely because there was no "present" violation; there were merely "continuing" and "neutral" effects of the past act. *Id.* at 557-58. The key inquiry is "whether any present *violation* exists." *Id.* at 558 (emphasis in original). After no timely charge was filed, the employer was "entitled to treat that past act as lawful" because a "discriminatory act which is not made the basis for a timely charge is the legal equiv-

alent of a discriminatory act which occurred before [Title VII] was passed. It . . . is merely an unfortunate event in history which has no present legal consequences." *Ibid.* The Court concluded, "such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." *Id.* at 560.

Similarly, in *Ricks*, a college denied an African-American professor tenure and gave him a non-renewable one-year contract. 449 U.S. at 252-56. After the contract expired, he filed an EEOC charge and a lawsuit, but the Court held the claim was untimely – any discriminatory act occurred, and thus the claim accrued, when he was denied tenure. *Id.* at 256-58. No discriminatory act "continued until, or occurred at the time of, [his] actual termination"; rather, his termination was merely "one of the *effects* of," and "a delayed, but inevitable, consequence of," the denial of tenure. *Id.* at 257-58 (emphasis in original). As in *Evans*, the Court instructed that the "proper focus" is on whether a present violation exists, not on when the "consequences" of a prior unlawful act become "most painful." *Id.* at 258 (quotation omitted).

Chardon applied this analysis to a First Amendment claim. There, school administrators received letters stating they would be terminated in the next few months, and filed suit after being terminated. 454 U.S. at 6-7. The Court, citing *Ricks*, concluded that the claim was untimely because it accrued when the letters were received, as the decision to terminate was the allegedly discriminatory act and the later

termination was merely an effect of that decision. *Id.* at 7-8.

On the other hand, in *Bazemore*, African-American employees filed an EEOC charge and a lawsuit claiming intentional discrimination because they were being paid less than whites. 478 U.S. at 389-91. Before Title VII's enactment, the employer segregated employees and paid African-Americans less; and although the employer had since stopped segregating, pay disparities remained. *Id.* at 390-91. Finding a present violation, the Court wrote: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96. As *Ledbetter* later explained, "the focus [in *Bazemore*] was on a current violation, not the carrying forward of a past act of discrimination." 550 U.S. at 635 n.5. If an employer "adopts and intentionally retains" a "facially discriminatory pay structure," it "engages in intentional discrimination whenever it issues a check." *Id.* at 634. By contrast, no fresh violation occurs if the employer simply fails to remedy the "present effects" of prior discrimination. *Id.* at 635 n.5 (quotation omitted). For this reason, each paycheck issued under a facially-discriminatory pay structure is a new violation, although that is not the case under "a system that is 'facially nondiscriminatory and neutrally applied.'" *Id.* at 637 (quoting *Lorance*, 490 U.S. at 911).

Next, in *Lorance*, female employees alleged that their employer adopted an intentionally discriminatory seniority system but filed no EEOC charge until they were laid off based on seniority. 490 U.S. at 904-06. Discussing *Evans*, *Ricks*, and *Chardon*, the

Court rejected their argument that the unlawful practice occurred when the system was adopted and when each effect of its adoption was felt. *Id.* at 906.[3] That is because this was a "facially neutral system," albeit allegedly adopted with discriminatory intent, and so the discrimination occurred "*only* at the time of [its] adoption"; without another discriminatory act, "each application" of the system was "nondiscriminatory." *Id.* at 912 n.5 (emphasis in original). Significantly, the Court explained that, in theory, the claim could be timely based on a "continuing violation which 'occurred'" not only when the system was adopted "but also when each of the concrete effects" of its adoption was felt, but that approach had been flatly rejected in *Evans*, *Ricks*, and *Chardon*. *Id.* at 906. Nor was the case like *Bazemore*, under which every act taken under a "facially discriminatory" policy is actionable, because such a policy "by definition" intentionally discriminates "each time it is applied." *Id.* at 912 n.5. That rule rightly does not apply to facially-neutral policies: "[A]llowing a facial-

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[3] After *Lorance*, Congress enacted 42 U.S.C. § 2000e-5(e)(2), so that claims of intentional discrimination involving seniority systems accrue when the system is adopted or applied. As *Ledbetter* explained, 550 U.S. at 627 n.2, while *Lorance*'s specific holding regarding seniority systems was abrogated, its reasoning otherwise remains persuasive since it follows directly from *Evans* and *Ricks*. This case does not involve a seniority system, so *Lorance*'s reasoning applies. The same is true of *Ledbetter*, which we discuss below. Months ago, in response to *Ledbetter*, Congress enacted 42 U.S.C. § 2000e-5(e)(3)(A), so that claims "with respect to discrimination in compensation" accrue when someone "becomes subject to" or "is affected by application of" a 'discriminatory compensation decision or other practice." Because this case does not fall under this amendment, it, too, has no impact on this case. Like *Lorance*, then, *Ledbetter*'s reasoning is fully applicable here.

ly neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that [the limitations period] was meant to protect." *Id.* at 912.

In *Morgan*, the Court identified a category of continuing violations for Title VII claims. Such claims "will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." 536 U.S. at 122. But, as we mention above, the Court effectively limited this doctrine to claims where the violation is not known until acts have been repeated over time, like a hostile work environment. *Id.* at 110-22.

Ledbetter is the latest in this line. The employee in *Ledbetter* filed an EEOC charge and a lawsuit challenging the denial of pay raises over 19 years based on performance evaluations she claimed were discriminatory. 550 U.S. at 621-22. The Court held that the claim was "squarely foreclosed by our precedents" (*id.* at 625), discussing *Evans*, *Ricks*, *Lorance*, and *Morgan* (*id.* at 624-29). The Court reiterated that "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Id.* at 628. The claims of plaintiff, however, accrued only when she received a poor evaluation and no raise. *Ibid.* The Court duly noted that the prior evaluations had ongoing effects – she received less each payday – but the "intent associated with" those acts could not be shifted "to a later act that was not performed with bias or discriminatory motive," because that would "impose liability in the absence of the requisite intent," and would "effectively eliminate

the defining element of her disparate-treatment claim." *Id.* at 629. The Court also recognized the importance of filing intentional discrimination claims quickly, because the "passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." *Id.* at 631.

From these cases, the Seventh Circuit concluded that petitioners' claim accrued when the eligibility list was adopted and announced. That straightforward application of law to the specific facts of this case is unassailable. The court first identified "with care" (*Ledbetter*, 550 U.S. at 624) the unlawful employment practice claimed. Petitioners complained that the examination and decision to limit hiring to those "well qualified" had a disparate impact on African-Americans. Pet. App. 2a, 4a, 7a. The court determined when the injury occurred – when petitioners were placed in the "qualified" category, because that decision delayed their hiring "indefinitely." *Id.* at 9a. In turn, everything petitioners challenged was traceable to that single decision – made in early 1996 and not revisited before late 2001 – and that decision alone. From that, the court correctly determined that "only one wrongful act" occurred. *Id.* at 7a (quotation omitted). And under the Court's cases, when a claim based on a discrete act accrues is clear: the claim here accrued when the decision was made and communicated, which was substantially more than 300 days before the EEOC filing.

The Seventh Circuit also correctly characterized each use of the list between May 1996 and November 2001 as an "automatic consequence" of the examination and list, and not its own "fresh act of discrimination." Pet. App. 4a; see *id.* at 6a, 7a. Use of

the list reflected no adverse impact that the list itself did not have. The list was neutral on its face and was used in a neutral manner, for those in the "well qualified" category were called in random order. This Court has repeatedly stated that the neutral application of a facially-neutral employment practice is not itself a discriminatory act and the inevitable consequences of a past unlawful act are not themselves actionable. Moreover, as the Seventh Circuit aptly explained (*id.* at 4a-5a), if the practice here had been facially discriminatory, each application would have given rise to a new claim. But, in this disparate-impact challenge to the examination and list, once the testing was done and applicants were sorted into facially-neutral categories, there was no further unlawful action in using the list. Petitioners' theory that subsequent uses of the list are themselves actionable discrimination improperly equates the present effects of a prior unlawful act with repeated illegal conduct. Nor was the City's failure to stop using the list sooner a fresh violation. Like the present effects of prior discrimination, the failure to undo prior discrimination does not give rise to a new claim. *Ledbetter*, 550 U.S. at 634-36 n.5; *Morgan*, 536 U.S. at 112-13. All told, there was only one, discrete act of discrimination here, albeit one with ongoing effects.

In addition, petitioners knew of their injury from the start, as the Seventh Circuit noted. Pet. App. 1a-3a, 11a. From around January 26, 1996, petitioners were aware they were not deemed "well qualified" and that this meant their hiring would at least be delayed. They received notice of this from the City, the Mayor's news release, and media reports. Supp. R. 436, Aff. ¶¶5-8, Exs. 1-2. Petitioners reported their knowledge to the attorney they met with in

April 1996, and he knew right away they had a "possible" disparate-impact claim. R. 74, Ex. K ¶¶1-2. As the Seventh Circuit therefore concluded, petitioners' delay in filing charges was inexcusable and "fatal." Pet. App. 11a.

Petitioners' contention that the Seventh Circuit's decision "results in different claim-accrual rules for disparate treatment and disparate impact cases" (Pet. 26) is ironic and demonstrably incorrect. As the court noted, it was petitioners who urged a different accrual rule for disparate-impact claims. Pet. App. 5a. The court rejected their invitation because it saw no basis in Title VII's plain language for applying a different rule, especially since "disparate treatment" and "disparate impact" are simply methods of proving discrimination claims, not types of discriminatory acts in and of themselves. *Id.* at 5a-6a. In fact, as the court pointed out, it had already rejected a similar argument in *Davidson v. Board of Governors*, 920 F.2d 441 (7th Cir. 1990). Pet. App. 6a. That is because, while a discrimination claim ultimately may be proved under two theories – disparate treatment and disparate impact (see 42 U.S.C. § 2000e-2(k); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971)) – as petitioners indicate (Pet. 26-27), a plaintiff may present the same facts under both theories. It would make no sense to apply different accrual rules to the same type of claim simply depending on how the plaintiff chooses to go about proving it. Moreover, if there should be a difference between these theories, the greater moral culpability of disparate treatment should prolong the accrual of those claims, not disparate-impact claims like petitioners'.

Regardless, there is no basis for creating such a distinction. Certainly nothing in Title VII indicates

that different accrual rules should apply. Relevant here, the language merely demands that a charge be filed within 300 days after the "unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). And, when Congress has disagreed with the Court's reading of Title VII's accrual rules, it has taken prompt action to make that clear. As we note above, after *Lorance* and *Ledbetter*, Congress amended the statute to provide different rules. See 42 U.S.C. §§ 2000c-5(e)(2), 2000e-5(e)(3)(A). But, the general rule emerging from the Court's cases for discrete acts applies here.

Petitioners also seek review on the basis that the decision below "threatens to undermine Congress's broad remedial purpose in enacting Title VII" (Pet. 23), because under Title VII's "short" limitations period (*id.* at 10, 24), an unlawful employment practice may be "immunize[d]" (*id.* at 23, 24) "indefinitely" (*id.* at 10) and "permanently" (*id.* at 11). Those concerns are wholly unfounded here. The Seventh Circuit honored not only the statute's terms but the equally important interest in repose. As it acknowledged, Title VII purposefully provides a "short" time for filing an EEOC charge. Pet. App. 10a. As this Court is well aware, Title VII was the product of legislative compromises, which included the "short" filing period. *Ledbetter*, 550 U.S. at 629-30. Indeed, by "choosing what are obviously quite short deadlines, Congress clearly intended to encourage prompt processing of all charges of employment discrimination." *Morgan*, 536 U.S. at 109 (quotation omitted). And, "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Ledbetter*, 550 U.S. at 632.

This delicate balance should not be skewed. The limitations period both "guarantee[s] the protection of the civil rights laws to those who promptly assert their rights" and "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57. While Title VII's remedial purpose should be realized when valid claims are diligently pursued, the statute reflects that "it is unjust to fail to put the adversary on notice to defend within a specific period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Ledbetter*, 550 U.S. at 630 (quotation omitted). See also *Mohasco Corp. v. Silver*, 447 U.S. 807, 820 (1980) ("[I]t seems clear that the [limitations] provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination."); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("[T]he length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."). For these reasons, once the limitations period passes with no EEOC charge, an employer is "entitled to treat [a] past act as lawful"; it becomes the "legal equivalent of a discriminatory act which occurred before [Title VII] was passed" and "merely an unfortunate event in history which has no present legal consequences." *Evans*, 431 U.S. at 558.

Interests in repose and reliance are equally important in a disparate-impact case like this one. While

Ledbetter recognized that prompt filing of disparate-treatment claims helps protect evidence of intent (550 U.S. at 631), challenges to eligibility lists years after adoption and announcement present their own problems. They "expose employers to a virtually open-ended period of liability"; "create substantial uncertainty" about "important staffing decisions based upon the list"; and call "into question an organizational structure" in place for years, upsetting reliance interests. *Cox v. City of Memphis*, 230 F.3d 199, 205 (6th Cir. 2000) (quotation omitted). As this Court put it, "allowing a facially neutral" practice "to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that" the limitations period "was meant to protect." *Lorance*, 490 U.S. at 912. With a theory that has no stopping point until the list is taken down, petitioners ignore the rights and expectations of others on the list. On petitioners' view, vast numbers of potential plaintiffs – 6,000 in this case – may stand idly by as eligibility lists are created and applicants are called from the list, and file charges years down the road. Adopting that view would upset reasonable reliance interests and impose back-pay liability on employers, despite Title VII's intentionally brief filing period. Nor does the limitations period forever "immunize" an employer (Pet. 24; see *id.* at 10, 11, 23), as petitioners fear. Eligibility lists are not used indefinitely, but only until the next examination is administered. And, while a list is up, any actual discrimination will give rise to another claim. Regardless, every petitioner here was well aware of a potential claim in the time to meet the limitations period. Petitioners' inexplicable delay should not prejudice others.

Citing various authority, petitioners also contend that the question here is "important" because examination results are commonly used to make hiring decisions and disparate-impact suits are regularly filed. Pet. 10, 19-24. Even if that is so, there is no indication that plaintiffs in those cases, or in most cases for that matter, were unable to file EEOC charges on time. But petitioners here were late, filing no charge within 300 days of the list's adoption and announcement, or even 300 days after the list's first use. Thus, they lost the opportunity to avail themselves of Title VII's protections.

At bottom, since there is no dispute what the relevant case law is, petitioners seek to have this Court apply those precedents differently than the Seventh Circuit did. Of course, this Court's review is not granted just to fix misapplications of law by the courts of appeals. Moreover, no error correction is needed here, for no error was made. The Seventh Circuit reached the correct result under the law and facts.

II. The Circuit Split On The Question Presented Is Shallow And Stale, And Will Likely Resolve Itself.

In the courts below, petitioners acknowledged no circuit split on the question presented (R. 74 at 4-9; Brief of Plaintiffs-Appellees 10, 30-35, No. 07-2052 (7th Cir.)), a fact they only quietly note to this Court (Pet. 17 n.9). Petitioners now advance a position that debuted in their request for rehearing *en banc* (Plaintiffs-Appellees' Petition for Rehearing *En Banc* 2, 9, No. 07-2052 (7th Cir.)) – that the division requires further review. While, as petitioners state *ad nauseam*, the City and the courts below recognized the split, there are at least three reasons their

new-found acknowledgment does not support review. First, petitioners get the math wrong: the disunity in the courts of appeals is far shallower than they submit. Second, the split that does exist is stale and, at this point, tolerable. Third, while petitioners see "nothing to suggest" that the split "will resolve itself without this Court's intervention" (Pet. 18), this ignores a wealth of this Court's cases. With future opportunity, the circuits are likely to align. But, if the tension persists, the Court may step in later, once the lower courts have fully considered the issue in light of more recent precedents.

To begin, the split is thinner than petitioners claim. Their tally is five to three, with the Second, Fifth, Ninth, Eleventh, and D.C. Circuits on their side, and the Third, Sixth, and now Seventh on ours. Pet. 3, 11-18. They add that, although the City acknowledged the split in the courts below, we failed to recognize its "full depth." *Id.* at 12. Just the opposite is true. Not only did petitioners disavow the split below, but they overstate it now. Only the Second and Fifth Circuits side with petitioners, while the Third, Sixth, and now Seventh Circuits agree with us. The other cases petitioners rely on do not decide the specific question here.

Firmly aligned with the Seventh Circuit is the Third, as petitioners now admit. Pet. 16 & n.8. In *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), a police department administered a promotion examination, created an eligibility list based on the results, and announced its decision to use the list for three years. *Id.* at 1077. EEOC charges claiming disparate impact were filed more than 300 days after the list was adopted and announced but before it was used. *Id.*

at 1078-80. Citing *Evans* and *Ricks*, the Third Circuit held that the claim accrued when the list was adopted; each use of the list was merely an effect of that, not a fresh violation. *Id.* at 1082-84. In so concluding (*id.* at 1083 & n.21), the court declined to follow any case decided before *Evans* and *Ricks*, including the Second Circuit's decision in *Guardians Association v. Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980), which we discuss below. The court explained that the employer did not "continue[ ] to discriminate against [plaintiffs] by its use of the eligibility roster," adding that "even if [the employer] had used the list," there was no suggestion that it "would have followed anything but a neutral, non-discriminatory procedure in hiring from the list," as its "policy was simply to hire in order from the list." 667 F.2d at 1083. The "non-discriminatory policy as to the use of the roster is similar to" the policy in *Ricks* to discharge "all faculty denied tenure." *Id.* at 1084. The list's use was "'a delayed, but inevitable consequence' of the allegedly discriminatory employment procedure – here a specific, identifiable act, the promulgation of the hiring roster." *Ibid.* (quoting *Ricks*, 449 U.S. at 257-58). "It is unlike, therefore, a continuing practice[.]" *Ibid.* The Third Circuit returned to the issue in *Hood v. New Jersey Department of Civil Service*, 680 F.2d 955 (3d Cir. 1982). There, a plaintiff claimed that an examination, and hiring and promotions lists based on the test scores, had disparate impact. *Id.* at 956. The court applied *Bronze Shields* to hold untimely an EEOC charge filed 300 days past the "list's promulgation." *Id.* at 959. The claim accrued "[a]t that time" because that is when plaintiff "knew that he would not be promoted during the next three years." *Ibid.*

Cox from the Sixth Circuit is the same. There, a police department gave an examination to determine promotions; created an eligibility list from the results; announced the list it planned to use for the next two years; and used the list twice. 230 F.3d at 201. Several women at the bottom of the list were not promoted and filed EEOC charges after the list's second use. *Ibid.* The parties agreed that an unlawful employment practice "occurred" when the list was announced (*id.* at 202), but plaintiffs insisted their claim was timely because "each promotion from the eligibility list constituted a separate act of discrimination" (*id.* at 201). The department countered that the claim was untimely because each use was merely "an effect of the original discriminatory act." *Id.* at 202. Relying on *Evans*, *Ricks*, and *Lorance*, as well as the Third Circuit's decisions in *Bronze Shields* and *Hood*, while rejecting the Second Circuit's *Guardians* decision, the Sixth Circuit settled on the "better view" that "promotion or hiring from an allegedly tainted promotions roster is not a 'continuing act' but is merely the effect of previous discrimination. It is at the point of promulgation of the roster that a potential plaintiff is aware that alleged discrimination is likely to play a pivotal role in her future advancement." *Id.* at 204. The "list was neutral on its face," and promotions "operated in a neutral manner after the list was compiled"; "any discrimination" that occurred was "in the compilation of the list." *Ibid.*

To be sure, the Second and Fifth Circuits track petitioners' view that each use of an eligibility list created from an examination with disparate impact is a new unlawful practice for statute of limitations purposes. In *Guardians*, a police department cited *Evans* (the only one of this Court's relevant cases then decided) to argue that the "'operative' event"

was the "promulgation of the eligibility lists reflecting the applicants' scores on the challenged exams," because the lists "determined the order in which all appointments were made"; uses of the list were "merely the non-actionable perpetuation of the effects of past, non-actionable discrimination." 633 F.2d at 248-49. The Second Circuit disagreed, stating that by repeatedly using the "tainted test results," defendants "continued a course of discriminatory conduct that . . . did not cease until defendants abandoned the practice of making hiring decisions in this manner." *Id.* at 249. A year later, despite the intervening decision in *Ricks*, the Second Circuit followed *Guardians* in *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 274-75 (2d Cir. 1981).

The Fifth Circuit has joined this approach. In *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980), the employer used examinations to make promotions and plaintiff was not promoted based on his test scores. *Id.* at 243-44. The district court found his EEOC charge was untimely, but, offering virtually no analysis, the Fifth Circuit reversed and remanded for a determination whether the employer "continued to base its selection of employees to receive job opportunities upon scores from an unvalidated battery of tests." *Id.* at 249. If so, the court said, the violation would be viewed as "continuing," rendering his claim timely. *Ibid.*

Like the Second Circuit's decision in *Guardians*, *Gonzalez* precedes all but *Evans*. While *City of Bridgeport* post-dates *Ricks*, the Second and Fifth Circuit decisions plainly do not reflect the full line of this Court's precedents, as the decisions of the Sixth and Seventh Circuits do. And, while the Second and

Fifth Circuits are in tension with the Third, Sixth, and Seventh, the conflict first appeared 30 years ago. There is no reason to address it now, especially when the trend in the Sixth and Seventh Circuits, not to mention the numerous decisions of this Court, may cause the Second and Fifth Circuits to reevaluate their position. While petitioners contend that the circuit split "will [not] resolve itself without this Court's intervention" (Pet. 18), they do not explain this and there is no reason to think it is correct.

In fact, petitioners mistakenly rely on the more recent Second Circuit decisions in *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996); *Harris v. City of New York*, 186 F.3d 243 (2d Cir. 1999); and *Connolly v. McCall*, 254 F.3d 36 (2d Cir. 2001). Pet. 18 n.10. For starters, *Van Zant* concerned a hostile work environment claim, where it was more settled that the continuing violation doctrine applied. *Van Zant* did not involve an eligibility list with disparate impact, so the court's inclusion of "the use of discriminatory seniority lists or employment tests" (80 F.3d at 713) in the category of continuing violations is *dicta* (see *Cox*, 230 F.3d at 204). As such, *Van Zant* presented no occasion for the Second Circuit to reassess its position on the issue here.

More significantly, *Harris* and *Connolly* reveal that the Second Circuit may be aligning with the Sixth and Seventh Circuits. In *Harris*, an employee was denied a promotion based on an eligibility list, and the court concluded that, as petitioners note (Pet. 18 n.10), one of the claims was timely because the employer had "engaged in a continuing violation by not promoting him" while the list was up (186 F.3d at 248). What petitioners fail to mention is that,

regarding another claim, the court said that the continuing violation doctrine "does not apply when a plaintiff challenges a facially neutral policy" and "offers no evidence that the policy has a discriminatory motive." *Id.* at 249 (citation omitted). "Instead, to advance a continuing violation claim a plaintiff must point to his disparate treatment stemming from a continuous practice of intentional discrimination" (*ibid.*), and "a continuing violation cannot be established merely because the claimant continues to feel the effects of a time-barred discriminatory act" (*id.* at 250).

Like *Van Zant*, *Connolly* did not involve disparate impact of an examination and eligibility list. Rather, it concerned a constitutional challenge to a statute that suspended pension benefits for any retired government worker who took another government job, unless a waiver was obtained every two years. 254 F.3d at 39-41. Defendants argued the claim was untimely because it accrued when plaintiff took the second job; but the Second Circuit held it was timely because a claim accrued each time he applied for a waiver. *Id.* at 41-42. While the court analogized the case to *Guardians*, as the "repeated application of a discriminatory policy" (*id.* at 41), in fact, the policy in *Connolly* was facially discriminatory, while in *Guardians*, and here, the practice was facially neutral. As such, despite the reference to *Guardians*, *Connolly* may be read as correct under *Bazemore*, and the Seventh Circuit recognized that rule under such facts. Pet. App. 4a-5a.

Moreover, the Second Circuit may soon be poised to reconsider its position. A few months ago, a district court in the Second Circuit issued a decision in a case presenting a Title VII claim regarding an examina-

tion and a hiring eligibility list with disparate impact on African-Americans. *United States v. New York*, No. 07-2067, 2009 WL 212154, at *1-2 (E.D.N.Y. Jan. 28, 2009). New York sought summary judgment, arguing this claim was untimely because no EEOC charge was filed within 300 days after applicants were informed of the test results. *Id.* at *2. Plaintiffs countered that a charge could be filed up until 300 days after the "last date on which the [c]ity used the eligibility lists to hire new firefighters." *Ibid.* Based on circuit precedent, it denied the city's motion. *Id.* at *3-7. In doing so, the court wrote: "Underlying this dispute about the proper accrual date for the charge filing period is the parties' disagreement about the effect of the Supreme Court's decision in *Ledbetter*" on prior Second Circuit cases. *Id.* at *3. "At issue is whether *Guardians* and *City of Bridgeport* survive recent Supreme Court rulings" in *Ledbetter* and *Morgan*. *Id.* at *4. The court concluded that the Second Circuit's decisions were not "overruled by recent Supreme Court precedent," adding that it was "aware of the [c]ity's position that recent Title VII precedent may have eroded the basis for those thirty-year-old decisions. The court is also aware that other circuits have reached a different conclusion about whe[n] employment practices similar to the one here" accrue, citing the Seventh Circuit's decision in this case and the Sixth Circuit's *Cox* decision. *Id.* at *7.

In short order, then, the Second Circuit may have the opportunity to squarely reassess *Guardians* and *City of Bridgeport*. And, given that court's more nuanced decisions in *Harris* and *Connolly*, it may well reach a different result, bringing the law of that circuit in line with the Sixth and Seventh. If it does not, then it is quite possible that this Court will be presented again with this question. If so, the issue

will have benefitted from further percolation based on more recent precedents. Indeed, if the Second Circuit maintains its position, that decision will merit review for the additional reason that it will be incorrect. Similarly, since there is little fanfare in *Gonzalez*, the Fifth Circuit may take advantage of another case at least to explain its analysis more thoroughly. And, if that opportunity arises, the Fifth Circuit may reach a different result, especially if the Second Circuit has modernized its position by then.

Petitioners attempt to expand the split with Eleventh and D.C. Circuit cases, but even they recognize that the precise issue in those cases was "adoption and repeated application of employment benefit policies." Pet. 14. In other words, they did not involve an examination and eligibility list with disparate impact. For this reason alone, *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), and *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999), do not directly conflict with the decision below. Beyond that, if the issue were the same, the Eleventh Circuit was bound to follow the Fifth Circuit's decision in *Gonzalez* (975 F.2d at 796 & n.2), and so, *Beavers* hardly counts in the split. Finally, the Seventh Circuit addressed *Beavers* and accommodated its holding (while questioning whether it was even correct). Pet. App. 5a.[4]

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[4] *Beavers* involved a disparate-impact challenge to an employer's "policy of denying medical and dental insurance coverage to the children" of employees "if those children [did] not reside full time with their employee-parent." 975 F.2d at 794. Plaintiffs sued long after the policy was adopted but within 180 days (the applicable limitations period) of the denial of their claims for dependent coverage. *Id.* at 794-96. The court held the claims timely because the denial was pursuant to the policy,

As for *Anderson*, it involved allegations that the employer paid employees differently based on race. 180 F.3d at 332. The D.C. Circuit, citing *Bazemore*, concluded that the employer was presently paying similarly-situated employees differently, and thus a new violation occurred with every paycheck, rejecting the employer's argument under *Evans*, *Ricks*, and *Lorance*. *Id.* at 335-36. But, after *Morgan*, the court decided *Law v. Continental Airlines Corp.*, 399 F.3d 330 (D.C. Cir. 2005). There, pilots allegedly were not promoted due to age discrimination, and this time, the court relied on *Evans*, *Ricks*, and *Lorance*, and distinguished *Bazemore* and *Anderson*. *Id.* at 332-34. Like the Seventh Circuit, the D.C. Circuit held that while a facially-discriminatory policy may be challenged any time, the same is not so for a facially-neutral policy, where plaintiff "offered no evidence of discriminatory purpose other than (at most) the discrete time-barred decision." *Id.* at 333-34. "To decide otherwise would completely undo" *Morgan* and *Lorance*. *Id.* at 334. So, while neither *Anderson* nor *Law* concerns examinations and eligibility lists, to the extent they bear on the issue here, *Law* signals that the D.C. Circuit would join the Third, Sixth, and Seventh, not the Second and Fifth.

Finally, petitioners submit that the Ninth Circuit's decision in *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991), deepens the conflict. Pet. 12-13. It does not. *Bouman* at least involved a Title VII challenge to an examination and list used for promotions. 940 F.2d at 1217-18. As here, the employer argued that the EEOC charge was untimely because it was not filed within the applicable limitations period after the

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and thus was part of a continuing violation. *Id.* at 796-800. This pre-*Morgan* decision is incorrect.

list's promulgation. *Id.* at 1221. The Ninth Circuit disagreed, distinguishing *Bronze Shields* on the basis that the claim did not accrue until the list expired because not until then was it certain she would not be promoted. *Ibid.* As the Seventh Circuit indicated (Pet. App. 6a-7a), the Ninth Circuit's approach has been resoundingly rejected, including by this Court (see *Lorance*, 490 U.S. at 907 n.3; *Chardon*, 454 U.S. at 8; *Ricks*, 449 U.S. at 260-61; *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 234 (1976); see also *Cox*, 230 F.3d at 205; *Kennedy v. Chemical Waste Management, Inc.*, 79 F.3d 49, 50 (7th Cir. 1996)). Indeed, the possibility of being promoted down the road does not mean no injury occurred upon the list's adoption. The delay in being promoted, with its attendant loss of pay and seniority, is itself an injury. It is of no matter, then, that the Ninth Circuit again relied on this mistaken premise in a recent unpublished decision, as petitioners indicate. Pet. 18.

Moreover, in *Hulteen v. AT&T Corp.*, 498 F.3d 1001 (9th Cir. 2007), on which this Court granted certiorari and recently heard oral argument (see *AT&T Corp. v. Hulteen*, No. 07-543), the Ninth Circuit noted that *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), decided a month after *Bouman*, "distinguished facially neutral from facially discriminatory" practices (*Hulteen*, 498 F.3d at 1010 n.7). According to *Pallas*, *Evans*, *Lorance*, and *Bazemore* stand for the proposition that disparate impact "resulting from a bona fide seniority system that is facially neutral must be challenged within the statute of limitations from the time the system is adopted; with a facially neutral system, the discriminatory act occurs at the time of adoption and subsequent applications do not constitute continuing violations." 940 F.2d at 1326. For what it is worth, it

seems that, if the Ninth Circuit faced the issue here again, it would join the Seventh Circuit as well.

In the end, given this Court's recent decision in *Ledbetter*, along with the Seventh Circuit's decision here and the Sixth Circuit's decision in *Cox* eight years ago, there is no reason to be concerned about decisions in the Second and Fifth Circuits, which have not been reevaluated in 30 years. As we explain above, only *Evans* was decided before *Guardians* and *Gonzalez*, so those cases did not take account of *Ricks*, *Chardon*, *Bazemore*, *Lorance*, *Morgan*, or *Ledbetter*, let alone current circuit decisions. At this point, this shallow and stale conflict provides no basis for review.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

ARTHUR L. LEWIS, JR., *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The acknowledged split is entrenched, not "shallow," and will likely not resolve itself without this Court's intervention.

The City concedes an entrenched circuit split, but contends that this Court should not intervene because the split is "shallow" and "will likely resolve itself" when various circuits change their positions in the future. BIO 8. Both assertions are mistaken.

1. The City acknowledges, as it must, that the courts of appeals are divided on the question presented. Yet the City contends that the split is only two (Second and Fifth Circuits) to three (Third, Sixth, and Seventh Circuits), and is thus too "shallow" to warrant review. BIO 8, 22. Even if the City were correct that the split is two-three, instead of five-three as petitioners maintain, *see* Pet. 10-19, this Court has recently granted certiorari to address smaller splits on questions related to the timeliness of EEOC charges under Title VII. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2166 (2007) (noting that the Court intervened to resolve a two-one split); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 107-08 & n.3 (2002) (same).

In fact, however, the split is deeper than the City acknowledges. The City mischaracterizes the positions of the Ninth, Eleventh, and D.C. Circuits:

Ninth Circuit. Although the City argues that *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991), does not "deepen[ ]" the conflict on the question presented, BIO 30, the Seventh Circuit—which otherwise was at pains to distinguish conflicting author-

ity—acknowledged the conflict with *Bouman*. App. 6a-7a.

Eleventh Circuit. The City is correct that the Seventh Circuit sought to distinguish *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), BIO 29, but the Seventh Circuit thought it "arguable" which way *Beavers* should have come out, and its distinction of *Beavers* was, by the Seventh Circuit's own admission, a "fine one." App. 5a. As pointed out in petitioners' opening brief, the distinction is in fact non-existent. Pet. 15 n.7.

D.C. Circuit. The City contends that *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999), should not count toward the split because it did not involve civil service examinations, as many of the other cases do. BIO 29-30. But that is a distinction without a difference. In all the cases cited by the parties and by the Seventh Circuit, the legal issue is the same: whether each use of an employment practice that causes a disparate impact for a protected group is a violation that starts the charge-filing period. *See* Pet. 14-15.

The City also asserts that *Anderson* is undermined by *Law v. Continental Airlines Corp.*, 399 F.3d 330 (D.C. Cir. 2005). BIO 30. But *Law* disclaimed any conflict with *Anderson*, noting that "[t]he present case is . . . quite distinct from . . . our own decision in *Anderson* . . . ." *Law*, 399 F.3d at 334. In any event, an intra-circuit conflict within the D.C. Circuit would only strengthen the case for certiorari.

2. The City concedes that the Seventh Circuit's holding is contrary to *Guardians Association v. Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980),

and *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980). Nevertheless, the City characterizes *Guardians* and *Gonzalez* as "stale" because they predate this Court's most recent decisions addressing Title VII's charge-filing periods. BIO 8, 25-27, 32. As the City acknowledges, however, both *Guardians* and *Gonzalez* post-date *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). BIO 25. In addition, the Second Circuit's decision in *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 273-75 (2d Cir. 1981) (applying *Guardians*), post-dates *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The Seventh Circuit relied mainly on *Ricks* and did not claim that any of this Court's post-*Ricks* cases changed the legal landscape. App. 4a. Moreover, this Court's subsequent Title VII timeliness decisions note that they are strictly following *Evans* and *Ricks*. *See, e.g.*, *Ledbetter*, 127 S. Ct. at 2167-69.

The continuing vitality of *Guardians* is apparent in *United States v. City of New York*, No. 07-cv-2067, 2009 WL 212154 (E.D.N.Y. Jan. 28, 2009). The district court held—in circumstances nearly identical to those presented here—that the EEOC charges of black firefighter candidates in New York were timely. *See id.* at *2-*7. In so doing, the district court adopted the position advocated by the United States Department of Justice, and specifically rejected both (a) the argument that *Guardians* had been overruled by intervening decisions of this Court, and (b) the Seventh Circuit's reasoning in this case. *See id.*; *see also* U.S. Resp. to Mot. to Dismiss 8-13, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y. June 4, 2008) (rejecting the defendant's argument

that *Ledbetter* and *Morgan* overruled *Guardians*); U.S. Supp. Letter Br. 3, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y. June 19, 2008) ("*Lewis v. City of Chicago* . . . is not binding law in this Circuit, and . . . is contrary to existing Second Circuit law." (citing *Guardians*)).

The City speculates that, if appealed, *City of New York* could provide the occasion for the Second Circuit to reconsider and reverse *Guardians*. BIO 8, 27-29. However, no interlocutory appeal of the district court's decision was requested or certified under 28 U.S.C. § 1292(b), and the litigation is still proceeding toward trial in the district court. *See* Docket, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y.). Accordingly—assuming the case does not settle as most lawsuits do—any appeal is years away.[1] Nor is there any basis for the City's assumption that the Second Circuit would change course, given the United States's support for the Second Circuit position and the persuasive arguments, discussed *infra* Part II, for upholding that position.

3. The City also labels the acknowledged circuit split "tolerable," BIO 22, but cannot explain why different charge-filing rules in different circuits should be tolerated. This Court has consistently viewed non-uniformity of Title VII charge-filing rules as intolerable and therefore has intervened numerous

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[1] The City also predicts that the Ninth Circuit would change its ruling in *Bouman* if given the opportunity (after arguing that *Bouman* is not, in fact, on point). BIO 30-32. This speculation is belied by the Ninth Circuit's application of its *Bouman* holding in *Tatreau v. City of Los Angeles*, No. 03-56638, 138 F. App'x 959, 961 (9th Cir. 2005) (unpublished).

times to eliminate circuit conflicts in this area. *See infra* Part II. This is understandable given the predicament that multi-circuit employers confront when different charge-filing rules apply to different employees in different jurisdictions.

II. The Seventh Circuit's decision contradicts the text of Title VII and misapplies this Court's precedents.

In light of the acknowledged circuit split on the question presented, the City devotes most of its opposition to arguing that the Seventh Circuit was correct and the five contrary circuits are wrong. BIO 8-21. Of course, "the fact a case may have been rightly decided" is not "in itself enough to preclude certiorari." Stern & Gressman, Supreme Court Practice 227 (8th ed. 2002) (quoting Justice John Marshall Harlan II, *Manning the Dikes*, 13 Record of N.Y. City Bar Ass'n 541, 551 (1958)).

Even on its own terms, however, the City's defense of the Seventh Circuit's decision is unpersuasive. First, the Seventh Circuit's decision is unmoored from the text of Title VII. Second, it misinterprets this Court's prior Title VII charge-filing cases. Third, it unjustifiably creates two different charge-filing rules—one for practices that discriminate on their face and are challenged under Title VII's disparate treatment provisions and another for practices that discriminate in operation and are challenged under the statute's disparate impact provisions. Fourth, these errors cannot be excused, as the City argues, on the ground that the Seventh Circuit's rule provides employers with "repose" when

they adopt and then repeatedly use a discriminatory practice. BIO 19.

1. Title VII provides in pertinent part: "A charge . . . shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Where, as here, "the alleged unlawful employment practice" at issue is the subject of a disparate impact claim, the plaintiff must prove that the employer "*uses* a particular employment practice that causes a disparate impact on the basis of race." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added). By the plain language of the statute, each *use* of an employment practice that causes a disparate impact is *prima facie* unlawful. If such *use* is proved, the employer is liable unless it "demonstrate[s] that the challenged practice is job related for the position in question and consistent with business necessity" and less discriminatory alternatives are unavailable. 42 U.S.C. § 2000e-2(k)(1)(A)(i)-(ii).

In this case, each time the City used the eligibility list created from the challenged hiring exam to fill each of ten separate hiring classes, it "use[d] a particular employment practice"; that particular practice by its use disparately excluded African American candidates; and, as the district court found, the practice was not job related and other less discriminatory alternatives were available. *Id.*; App. 13a-14a. Thus, *every* time the City excluded petitioners from a round of hiring, a full-blown Title VII violation—with all the elements required for a disparate impact claim—occurred. Charges were therefore timely if filed within 300 days of a hiring decision, as the charges in this case were. Pet. 6.

The Seventh Circuit did not acknowledge, much less address, the statutory text. Its holding—that the trigger for the charge-filing period is the employer's "adoption" of a particular employment practice, and that the subsequent *use* of the practice is not actionable if that use can be called the "automatic consequence" of the practice's original adoption—creates an exception that overrides the clear text. App. 4a, 6a. Title VII makes *use* of a practice with a disparate impact a *prima facie* violation; it provides no exception for uses that are characterized as the "automatic consequence" of the earlier "adoption" of the practice. The plain meaning of the statute thus provides no support for the idea that only the *first* "use" of the practice is unlawful, or that the illegality of subsequent uses depends on their being causally independent from the first "use." *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").[2]

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[2] The Seventh Circuit's failure to adhere to the ordinary meaning of the word "*use*" is apparent in its imprecision with respect to the event that triggers the charge-filing period. *Compare* App. 6a (referring to "the adoption of the standard"), *with* App. 4a (charge period starts "when the tests were scored and . . . the applicants learned the results"). The City attempts to elide this imprecision with a different, but also textually ungrounded, standard. *See* BIO 8 ("[T]he claim accrued when the [eligibility] list was adopted and announced.").

2. The Seventh Circuit's decision also misinterprets this Court's holdings on the timeliness of EEOC charges.

The rule of this Court's decisions is simple: if, and only if, an employer's actions satisfy all elements of a Title VII violation, then the charge-filing period begins. *See Ledbetter*, 127 S. Ct. at 2167-68; *Ricks*, 449 U.S. at 258; *Evans*, 431 U.S. at 558. This rule applies no matter how closely the violation at issue is related to earlier violations. *See Morgan*, 536 U.S. at 113 ("The existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.")[3]; *see also Ledbetter*, 127 S. Ct. at 2174 ("[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations."); *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986).

Conversely, if the employer's actions do not satisfy all elements of a violation at the time of those actions, then they are not a violation, even if they can be characterized as the "consequence" of earlier actions that were a violation. This rule explains *Evans*, *Ricks*, and *Ledbetter*, all of which were disparate treatment cases where an employer carried out

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[3] In reaching this conclusion, this Court rejected the Seventh Circuit's contrary approach in *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996) (Posner, J.). *See Morgan*, 536 U.S. at 106, 117 n.11 (disapproving *Galloway*). In the present case, the Seventh Circuit nonetheless relied on *Galloway*. App. 8a.

two employment actions: a first action that was allegedly motivated by discriminatory intent (and hence a disparate treatment violation) and a later action that did *not* satisfy, at the time of the later action, the required element of discriminatory intent.

Only one of this Court's charge-filing cases, *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), has discussed the accrual of both disparate treatment and disparate impact claims. In *Lorance*, the plaintiffs alleged they had been laid off in 1982 by application of a seniority rule adopted (without timely challenge) in 1979. *Id.* at 901-02. They lost their disparate treatment claim because they could not prove their employer harbored discriminatory intent at the time of their layoffs; the employer had simply applied a facially-neutral rule adopted years earlier, making the case identical to *Evans* and *Ricks*. *See Lorance*, 490 U.S. at 905-12.

The *Lorance* plaintiffs also alleged unlawful disparate impact discrimination. This Court held that claim precluded by Title VII's special provision protecting seniority systems from disparate impact challenges. *Id.* at 904-07. But the Court acknowledged that viewing the claim "as one of discriminatory impact" would have produced a different result, because in a disparate impact case the statute of limitations "run[s] from the time that impact is felt." *Id.* at 908. If the *Lorance* plaintiffs had not been prohibited from bringing a disparate impact claim by the seniority provisions of Title VII, they could have proved all elements of a disparate impact violation at the time of their layoffs, just as petitioners here proved all elements of a disparate impact claim each

time the City applied its practice to deny them consideration for specific firefighter vacancies.

3. The Seventh Circuit's reasoning clashes with this Court's rule that a facially discriminatory policy can be challenged any time it is used, since such a system "by definition discriminates each time it is applied." *Lorance*, 490 U.S. at 912 n.5; *see also Ledbetter*, 127 S. Ct. at 2173-74.

To see this conflict, suppose the City had adopted a facially discriminatory policy, announcing that in filling future firefighter vacancies, all whites on the eligible list would be hired before any African Americans. Using such a rule to exclude petitioners from consideration for vacancies would have been no less the "automatic consequence" of the adoption of the eligibility list than the City's exclusion of them in the present case. Yet, under *Ledbetter* and *Lorance*, petitioners could have challenged that facially discriminatory policy any time vacancies were filled. The Seventh Circuit's "automatic consequence" rule thus cannot be reconciled with this Court's established rule for facially discriminatory policies.

The Seventh Circuit itself acknowledged that Title VII charge-filing rules should be the same for disparate impact and disparate treatment cases. App. 5a. Yet the Seventh Circuit's opinion creates different rules, allowing charges to be filed within 300 days of any use of a practice when disparate treatment is alleged but solely within 300 days of the initial adoption of the practice when disparate impact is claimed. This dichotomy is indefensible, as the undisputed facts of this case demonstrate. As the district court found, the City was told by its con-

sultant at the outset that an 89 cut-off score did not validly distinguish between "well-qualified" and "qualified" test-passers. App. 21a-22a. Yet the City, without any supporting expert evidence, overrode its consultant's opinion, publicly defended the validity of the 89 cut-off score, and proceeded to use the test to hire nearly all-white firefighter classes for the next five years, knowing each time that the result of using the same practice over and over would be nearly all-white hiring. App. 16a, 22a-23a.

4. The City asserts that the interest in "repose" requires plaintiffs to spring into action at their first knowledge of a potential claim. BIO 19-20. This argument is also contrary to this Court's rule that a facially discriminatory policy may be challenged at any time. *See Lorance*, 490 U.S. at 912 n.5. An employer has no more claim to "repose" when it adopts and repeatedly uses a facially discriminatory policy that is illegal under Title VII's disparate treatment provisions than when it adopts and repeatedly uses a discriminatory-in-operation policy that is illegal under Title VII's disparate impact provisions.

Moreover, the Seventh Circuit's rule forces employees to institute litigation against their employer at a time when they have the least incentive to do so—when the policy is adopted on paper and before it has been used to deny any employee a concrete benefit. Employers can take advantage of that lack of incentive by adopting a foreseeably discriminatory practice, waiting 300 days, instituting actual use of the practice if no charge is filed, and then continuing to use the practice to discriminate for years. Judicial and administrative economy are not served by a rule that requires employees to initiate litigation upon

the adoption of practices that may never be applied to cause them serious harm.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-971

In the Supreme Court of the United States

ARTHUR L. LEWIS, JR., ET AL., PETITIONERS

v.

CITY OF CHICAGO, ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that an employer's use of an employment examination has an unlawful disparate racial impact, when the employer uses the results of the examination to hire employees during the statutory limitations period, but scores the examination and announces the results outside the limitations period.

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In the Supreme Court of the United States

No. 08-974

ARTHUR L. LEWIS, JR., ET AL., PETITIONERS

v.

CITY OF CHICAGO, ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a). The statute proscribes both disparate-treatment discrimination and disparate-impact discrimination. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation."); see also *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2672-2673 (2009).

To file suit under Title VII, a plaintiff must first file a timely charge with the Equal Employment Opportunity Commission (EEOC). A charge is generally timely if it is filed within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). But in States that have an administrative agency with authority to remedy practices prohibited by Title VII, a plaintiff who initially proceeds before that agency must file a charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred" or within 30 days of receiving notification that the state agency proceedings have been terminated, whichever is earlier. *Ibid.* Because the events at issue in this case took place in Illinois, which has such an administrative agency, the applicable limitations period under Section 2000e-5(e)(1) is 300 days.

2. In July 1995, respondent administered a written examination to more than 26,000 applicants as part of its hiring process for entry-level firefighters. After scoring the test, respondent grouped the scores into three categories: applicants who scored 89 or above were deemed "well qualified," applicants who scored between 65 and 88 were "qualified," and the remaining applicants failed the examination. Pet. App. 1a-2a, 45a.

In January 1996, respondent notified all applicants in writing of their test scores. The "well qualified" applicants "would be eligible to proceed to the next phase of the hiring process, a physical abilities test," followed by a background investigation, medical examination, and drug test. Pet. App. 14a-15a. An applicant who passed all of those "preliminary tests" would be "hired as a candidate firefighter." *Id.* at 15a. Applicants who failed the examination were told that they would no longer be con-

sidered for employment. The notice for applicants in the "qualified" class stated:

> Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

Id. at 46a (citation omitted); see *id.* at 2a, 46a-47a.

On January 26, 1996, the mayor issued a press release concerning the test results. The release stated that 1782 of the applicants who took the written examination were considered "well qualified" and would be contacted in random order to continue in the hiring process. Pet. App. 47a. The release further stated that, of those in the "well qualified" group, 75.8% were white, 24.2% were members of a minority group, and 11.5% were African-American. *Ibid.* By contrast, white applicants represented 45% of all applicants, while African Americans represented 37%. *Id.* at 15a. Finally, the release stated that the mayor was dissatisfied with the lack of diversity among the "well qualified" applicants. *Id.* at 47a. Local media subsequently reported the racial breakdown of the test results and the mayor's reaction to the scores. *Id.* at 48a.

In May 1996, respondent hired applicants from the "well qualified" group. It did so for a second time in October 1996, and ultimately engaged in a total of ten rounds of hiring from that group. Pet. App. 49a, 68a; Pet. 6; Br. in Opp. 1; Pls.' Mem. in Opp. to Def.'s Mot. to

Stay Enforcement of Judgments, Exh. A, at 4 (May 17, 2007). In 2001, when the list of "well qualified" applicants was exhausted, respondent began calling applicants from the "qualified" group for further processing for hire. Pet. App. 16a.

3. Petitioners represent a class of African-American firefighter applicants who were placed in the "qualified" category based on their scores on the July 1995 examination. Pet. App. 1a-2a. On March 31, 1997, petitioner Crawford M. Smith filed a charge of racial discrimination with the EEOC based on respondent's use of the July 1995 examination; other petitioners subsequently filed additional charges. *Id.* at 49a; Aff. of Daniel P. Broadhurst, Exh. 3 (Feb. 4, 2000). Smith's charge was filed within 300 days of respondent's calling "well qualified" applicants to be further processed for hire, but more than 300 days after respondent administered the examination, scored the results, and notified the applicants. Pet. App. 3a, 49a. The EEOC issued right to sue letters on July 28, 1998. *Id.* at 49a. On September 9, 1998, petitioners filed suit in the United States District Court for the Northern District of Illinois, alleging that respondent's use of the July 1995 test had an unlawful disparate impact on African-American candidates, in violation of Title VII. *Ibid.*; see *id.* at 2a.

Respondent moved for summary judgment, arguing that petitioners' suit was time-barred because petitioners' first EEOC charge was filed more than 300 days after petitioners were notified of the results of the July 1995 examination. Pet. App. 52a. The district court denied the motion. *Id.* at 11a-70a. The court distinguished this case from *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), in which this Court held that allegations of intentional national origin discrimination were un-

timely where the alleged discriminatory act—the denial of tenure—occurred outside the limitations period, even though the plaintiff would later feel the effects of that act when his employment was terminated. Pet. App. 54a-55a (citing *Ricks*, 449 U.S. at 257-258). In this case, the district court noted, petitioners "allege[d] that the 1995 examination had a disparate impact on African-American firefighter candidates, and that [respondent's] reliance on the examination's results continues to have a disparate impact on African-American candidates." *Id.* at 60a. The court concluded that, "if [petitioners] establish that the 1995 written examination used in [respondent's] firefighter selection process had an unlawful disparate impact on African-American candidates, then [respondent's] ongoing reliance on those results constitutes a continuing violation of Title VII." *Id.* at 69a.

After an eight-day bench trial, the district court ruled that respondent's use of the July 1995 examination violated the disparate-impact provisions of Title VII. Pet. App. 12a-43a. The parties had stipulated that the July 1995 test "had a severe disparate impact on African-American firefighter candidates." *Id.* at 28a. The court found that respondent had failed to discharge its statutory burden of showing that its use of the test was "job related for the position in question" and "consistent with business necessity," 42 U.S.C. 2000e-2(k)(1)(A)(i). Pet. App. 28a-42a. Specifically, the court found that the test "was skewed towards one of the least important aspects of the firefighter position at the expense of more important abilities," *id.* at 32a; that "the cut-off score of 89 is statistically meaningless in that it fails to distinguish between candidates based on their relative abilities," *id.* at 30a; and that respondent "failed to prove that test results could be used

to predict firefighter performance," *ibid.* See *id.* at 28a-41a. The court further found that "the evidence clearly shows that an equally valid and less discriminatory alternative was available." *Id.* at 41a (citing 42 U.S.C. 2000e-2(k)(1)(A)(ii)). The court entered judgment in favor of petitioners and ordered injunctive relief. *Id.* at 2a.

1. On appeal, respondent did not challenge the district court's finding that its use of the July 1995 examination violated Title VII's disparate-impact provisions. Instead, it challenged only the district court's holding that petitioners had timely filed a charge with the EEOC. Resp. C.A. Br. 16-47. Agreeing with respondent, the court of appeals reversed. Pet. App. 1a-11a.

The court of appeals concluded that the discrimination at issue in this case "was complete when the tests were scored and, especially in light of the mayor's public comment about them, was discovered when the applicants learned the results." Pet. App. 4a. Analogizing this case to *Ricks*, the court further concluded that "[t]he hiring only of applicants classified 'well qualified' was the automatic consequence of the test scores rather than the product of a fresh act of discrimination." *Ibid.* Accordingly, the court held that petitioners' claim accrued in January 1996, when respondent placed petitioners in the "qualified" category and "delayed indefinitely their being hired." *Id.* at 9a. Because petitioners had not filed a charge within 300 days of that date, the court of appeals instructed the district court to enter judgment for respondent. *Id.* at 11a.

DISCUSSION

The court of appeals in this case erred in concluding that a claim of disparate-impact discrimination based on

an employer's use of an invalid employment examination accrues only when the examination is scored and the results announced, and not when the employer later uses those results to hire or promote job applicants in a manner that adversely affects members of a protected group. The court's holding is inconsistent with the text of Title VII, unsupported by this Court's precedents, and in conflict with the decisions of other courts of appeals. This Court's review is warranted.

A. The Court Of Appeals Erred In Holding That Petitioners' Charges Were Untimely

1. Under Title VII, petitioners were required to file a charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1); see p. 2, *supra*. Title VII makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." 42 U.S.C. 2000e-2(a)(2). Title VII further provides that "[a]n unlawful employment practice based on disparate impact is established" if, among other things, "a complaining party demonstrates that a respondent *uses* a particular employment practice that causes a disparate impact on the basis of race." 42 U.S.C. 2000e-2(k)(1)(A)(i) (emphasis added); cf. 42 U.S.C. 2000e-2(h) ("[I]t shall not be an unlawful employment practice for an employer * * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration *or action upon the results* is not designed, intended, *or*

used to discriminate because of race, color, religion, sex, or national origin.") (emphasis added).

Petitioners argued, and the district court found, that respondent violated Title VII by hiring entry-level firefighters based on the results of an employment examination that had an unlawful disparate impact on qualified African-American candidates. Pet. App. 28a-42a. In so doing, respondent "use[d]" an unlawful selection device, 42 U.S.C. 2000e-2(k)(1)(A), in a manner that "deprive[d]" qualified African-American applicants of "employment opportunities," 42 U.S.C. 2000e-2(a)(2). When respondent hired firefighter candidates from the list of applicants deemed "well qualified" based on the July 1995 examination results, it thus engaged in an unlawful employment practice that started the 300-day clock under Section 2000e-5(e)(1). Because petitioners filed an EEOC charge before that period elapsed, they were entitled to proceed in federal court to remedy respondent's unlawful employment practices.

2. In reaching a contrary conclusion, the court of appeals failed to consider the language of Title VII's disparate-impact provisions. The court instead relied on a line of cases including *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which held that, to sustain a claim of intentional discrimination, a plaintiff must identify an act of intentional discrimination occurring within the statutory limitations period, and may not simply point to the effects of a past, discrete act of intentional discrimination. The court below erred in relying on that line of disparate-treatment cases to evaluate petitioners' disparate-impact claim, and failing to recognize

that that claim described a violation of Title VII within the statutory limitations period.

a. In *Ricks*, the plaintiff, a college professor, claimed that his employer intentionally discriminated against him on the basis of national origin when it denied him tenure and instead offered him a one-year "terminal" contract. 449 U.S. at 252-253. The plaintiff filed a charge with the EEOC shortly before the contract expired. *Id.* at 254. The Court held that the limitations period began to run when the tenure decision had been made and communicated to the plaintiff, "even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* at 258. The Court explained that the "emphasis is not upon the effects of earlier employment decisions; rather, it is [upon] whether any present *violation* exists." *Ibid.* (brackets in original) (quoting *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977)). Because the only claimed violation concerned the denial of tenure, and the plaintiff had not identified any "discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment," the Court concluded that the plaintiff's EEOC charge was untimely. *Id.* at 257-258.

Similarly, in *Lorance*, the plaintiffs alleged that a contractual modification in the seniority system for testers at an electronics plant was the product of intentional sex discrimination, but did not file an EEOC charge until years later, when they were selected for demotion under the new seniority system. 490 U.S. at 901-902. The Court held that the charge was filed too late. It noted that, if the "claim asserted [were] one of discriminatory impact under § 703(a)(2)," the "statute of limitations [would] run from the time that impact is felt." *Id.* at

908. But because the claim asserted was instead one of intentional discrimination, and "[b]ecause the claimed invalidity of the facially nondiscriminatory and neutrally applied tester seniority system is wholly dependent on the alleged illegality of signing the underlying agreement," the Court concluded that "it is the date of that signing which governs the limitations period." *Id.* at 911.[1]

Finally, in *Ledbetter*, the Court concluded that the plaintiff's claim of intentional pay discrimination was time-barred because the alleged discrimination occurred outside the statutory limitations period, rejecting the plaintiff's argument that the discrimination had been carried forward in the form of reduced pay and the denial of a raise. 550 U.S. at 624. The Court emphasized that the petitioner "ma[de] no claim that intentionally discriminatory conduct occurred during the charging period." *Id.* at 628; accord *id.* at 624. The Court concluded that accepting the petitioner's argument that an "unlawful employment practice" nevertheless occurred during the limitations period, as Section 2000e-5(e)(1) requires, would "require us in effect to jettison the defining element of the legal claim on which her Title VII

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[1] In response to *Lorance*, Congress amended Title VII to provide that an "unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose * * * when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." 42 U.S.C. 2000e-5(e)(2); see *Ledbetter*, 550 U.S. at 627 n.2.

recovery was based"—namely, "discriminatory intent." *Ibid.*[2]

b. Specifically analogizing this case to *Ricks*, the court of appeals held that petitioners' EEOC charge was untimely because respondent's discrimination "was complete when the tests were scored" and petitioners were informed that it was "not likely" that they would be hired. Pet. App. 1a, 16a. In the court's view, respondent's subsequent hiring practices were merely the "automatic consequence" of the earlier testing, rather than a "fresh act of discrimination." *Id.* at 6a.

But the *Ricks-Lorance-Ledbetter* line of cases does not stand for the broad proposition that any employment practice following from an earlier act of discrimination is not actionable under Title VII. As the Court made clear in *Ledbetter*, "a freestanding violation may always be charged within its own charging period regardless of its connection to other violations." 550 U.S. at 636. The claims in *Ricks* and other similar cases failed not because they were in some way connected to earlier violations, but because the plaintiffs had failed to allege that a violation occurred at any point during the limitations period; their claims rested on allegations of intentional discrimination, but their description of the events occur-

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[2] In response to *Ledbetter*, Congress amended Title VII to provide that an "unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5-6; see *AT&T Corp.* v. *Hulteen*, 129 S. Ct. 1962, 1973 (2009).

ring within the limitations period omitted the "defining element of [that] legal claim," namely, "discriminatory intent." *Id.* at 624.

Unlike in the intentional discrimination claims at issue in those cases, the defining element of a disparate-impact claim is the effect of an employment practice on members of a protected group, rather than the employer's intent in adopting the practice. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive * * * is not required under a disparate-impact theory."). As this Court has acknowledged, that difference necessarily affects the evaluation of the timeliness of an EEOC charge. While the Court held in *Ricks* and similar cases that "the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt," *Ledbetter*, 550 U.S. at 627, the Court has acknowledged that a claim of discriminatory impact, in contrast, "caus[es] the statute of limitations to run from the time that impact is felt," *Lorance*, 490 U.S. at 908.

In this case, petitioners have described a present violation of Title VII's disparate-impact provisions, related factually to earlier acts that might have formed the basis for a suit but itself constituting a freestanding legal harm. They have argued that respondent used a challenged employment practice during the statutory limitations period when respondent employed the results of the July 1995 examination to hire a new class of firefighters in a manner that adversely affected petitioners' employment opportunities because of race. See 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A). Their

EEOC charge was accordingly timely under Section 2000e-5(e)(1).

c. The analysis is not altered by respondent's practice of preceding hiring decisions by sorting test-takers into groups of "qualified" and "well qualified" applicants. See Pet. App. 1a. It is true, as the court of appeals noted, that petitioners were injured when they were told that they had been classified as "qualified" rather than "well qualified" based on the results of the July 1995 examination, thereby "delay[ing] indefinitely their being hired." *Id.* at 9a. But petitioners were also injured when they were in fact passed over because of those results. As the district court noted, if an examination used to sort applicants has an unlawful disparate impact, then an employer's use of the examination's results to hire employees "has the same disparate impact." *Id.* at 60a. An employer who would otherwise be prohibited from using the raw results of an unlawful test is not immunized from liability merely because it takes the intermediate step of labeling candidates "qualified" or "well qualified" based on those test results.

3. Although the court of appeals acknowledged the differences between a claim of disparate treatment and one of disparate impact, it concluded those differences were "not fundamental," Pet. App. 5a, and therefore should not "change the date on which the statute of limitations begins to run," *id.* at 6a. The court explained that disparate-impact theory "involves the use of circumstantial evidence to create an inference of discrimination." *Id.* at 5a. It further explained that if a test or other selection device proves to have an adverse impact on a protected group, and the employer cannot show that "the method is a rational method of selecting employees," then the employer's "continuing to use the test

suggests that his purpose in doing so may be discriminatory, although that need not be shown." *Id.* at 6a.

Even accepting the court of appeals' view of the connection between disparate-impact and disparate-treatment claims, its conclusion does not follow. An employer "continu[es] to use [a] test" with an unlawful disparate impact, Pet. App. 6a, each time it "uses" the results of the test to classify applicants and select employees. If the employer uses the test on one occasion to select employees, it will commit one violation; if the employer uses the test on subsequent occasions to select employees, it will commit subsequent violations. The court of appeals' decision identifies no reason why subsequent uses of an unlawful selection device are not independently actionable under Title VII.

4. Finally, the court of appeals suggested (Pet. App. 9a) that its holding was necessary to avoid the prospect that a plaintiff might wait as long as "ten years" before filing a Title VII charge based on an employer's use of an examination with an unlawful disparate impact. The question in this case, however, is whether a plaintiff may wait 300 days (or, in some States, 180 days) after an employer uses such examination results to select employees for hire. That use, once again, constitutes a violation of Title VII that sets the clock running, regardless how much time has elapsed since the administration of the examination. Moreover, as a practical matter, candidates for employment or promotion have little incentive to delay unreasonably in filing EEOC charges; such delay would postpone any possibility of attaining the employment opportunities they claim were unlawfully denied them. And the passage of time in the context of disparate-impact cases does not, in any event, raise the same concerns that it does in the disparate-treatment

context; while delay may make it more difficult to discern an employer's discriminatory intent in a disparate-treatment case, the pertinent evidence in disparate-impact cases is far less likely to "fade quickly with time." *Ledbetter*, 550 U.S. at 631; cf. 29 C.F.R. 1607.5(D), 1607.15 (requiring documentation of impact and validity evidence on employment practices with an adverse impact).

On the other hand, the court of appeals' decision could permit an employer to continue indefinitely to make employment decisions based on a concededly unlawful selection device, provided that no plaintiff has filed suit within 180 or 300 days of the announcement of the results. The lower court's decision, moreover, encourages—indeed, requires—plaintiffs to file lawsuits before they can be sure of the practical consequences of an employer's administration of an unlawful selection device—and may poison the workplace with anticipatory litigation before facts have crystallized. An employer that administers an employment examination may never in fact use the results to select employees for hire or promotion, or it may decide, as respondent eventually did in this very case, to hire from among the ranks of those adversely affected by the examination. See Pet. App. 9a, 16a. But under the decision below, a rational Title VII plaintiff will not wait to evaluate the practical consequences of an unlawful employment examination before filing. The decision creates incentives that are likely to lead to a proliferation of unnecessary litigation.

B. The Courts Of Appeals Are Divided On The Question Presented

As both the court of appeals (Pet. App. 6a-7a) and respondent (Br. in Opp. 22-26) have acknowledged, the courts of appeals are divided on the question presented.

1. As all parties agree (Pet. 13-14; Br. in Opp. 24-25), the decision below conflicts with the decisions of the Second and Fifth Circuits. Both courts have concluded, in direct contrast with the court of appeals in this case, that a charge based on an employer's use of an employment examination with an unlawful disparate impact is timely if the employer used the results to make hiring or promotion decisions at any point during the limitations period. See *Guardians Ass'n of the New York City Police Dep't* v. *Civil Serv. Comm'n*, 633 F.2d 232, 247-251 (2d Cir. 1980) (holding that the plaintiffs' EEOC charge was timely because it was filed within 300 days of the employer's last hiring decision based on the results of employment tests with a disparate impact on African-American and Hispanic candidates), aff'd on other grounds, 463 U.S. 582 (1983); *Gonzalez* v. *Firestone Tire & Rubber Co.*, 610 F.2d 241, 249-250 (5th Cir. 1980) (remanding for the district court to consider whether the charge was filed within 180 days after the employer's last hiring or promotion decision based on the results of the challenged testing system).

The decision below, as the court of appeals in this case acknowledged (Pet. App. 6a-7a), also conflicts with the Ninth Circuit's decision in *Bowman* v. *Block*, 940 F.2d 1211, cert. denied, 502 U.S. 1005 (1991). In that case, the court held that the plaintiff's EEOC charge was timely because it was filed within 300 days of the expiration of an eligibility list based on the results of a challenged promotion examination, even though the eli-

gibility list had been promulgated outside the limitations period.[7]

Other courts of appeals, including the District of Columbia and Eleventh Circuits, have applied a similar analysis in other contexts; they have concluded that a charge that an employment benefit policy has an unlawful disparate impact is timely if the policy was applied at any point during the limitations period. See *Anderson* v. *Zubieta*, 180 F.3d 329, 335-337 (D.C. Cir. 1999) (concluding that the plaintiffs' charges were timely, even though the plaintiffs were first notified of the challenged wage and benefit policies outside the limitations period applicable to their promulgation, because plaintiffs had adequately alleged that the "continued application" of the allegedly discriminatory policies constituted a "present violation"); *Beavers* v. *American Cast Iron Pipe Co.*, 975 F.2d 792, 796-800 (11th Cir. 1992) (concluding that the plaintiffs' charges were timely, even though the plaintiffs first became subject to the challenged policy outside the limitations period).[8]

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[7] Respondent contends (Br. in Opp. 30-31) that *Bowman* does not "deepen[] the conflict" because the Ninth Circuit in that case erroneously distinguished cases like *Ricks* on the ground that the plaintiff could not have been certain she would not be promoted until the eligibility list expired. See *Bowman*, 940 F.2d at 1221; see Pet. App. 6a-7a (criticizing *Bowman* for confusing the question when the plaintiff's claim accrued with the question whether equitable tolling would be warranted). For present purposes, however, the relevant point is that the Ninth Circuit considered the plaintiff's "non-appointment from the eligible list" to be "a separate injury from the allegedly discriminatory examination itself" or from the posting of the list, *Bowman*, 940 F.2d at 1221, and thus reached a result "contrary" to the decision below, Pet. App. 6a.

[8] The court of appeals attempted to distinguish *Beavers* on the ground that the alleged discriminatory practice there at issue—a health

2. On the other hand, the decision below is consistent with *Bronze Shields, Inc.* v. *New Jersey Department of Civil Service*, 667 F.2d 1074 (1981), cert. denied, 458 U.S. 1122 (1982), in which the Third Circuit concluded that an EEOC charge that an employment examination had a disparate impact was untimely because it was filed more than 180 days after the employer had published an eligibility list based on the results (though before the employer ever used the list to make a hiring decision). *Id.* at 1083-1084. It is also consistent with *Cox* v. *City of Memphis*, 230 F.3d 199 (2000), in which the Sixth Circuit held that the plaintiffs' claim that the employer "deliberately set out to discriminate against white females in the promotional process," *id.* at 201, was time-barred because the list of individuals eligible for promotion had been promulgated outside the limitations period, *id.* at 204.[5]

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insurance policy that limited coverage of employees' children to those residing full-time with an employee parent, see *Beavers*, 975 F.2d at 784—was the "sole cause" of the denial of the plaintiffs' insurance claims, and "there was no intervening neutral act, as in this case," Pet. App. 5a. But as explained above, pp. 7-13, *supra*, the hiring of applicants deemed "well qualified" based on the results of the unlawful test in this case was not a "neutral act," but rather an independent violation of Title VII's disparate-impact provisions. In any event, the court of appeals itself recognized that the distinction it proposed "is a fine one (and it is arguable on which side of it the facts of *Beavers* fell)." Pet. App. 5a.

Both *Bronze Shields* and *Cox* are, however, distinguishable from the instant case. The plaintiffs in *Bronze Shields* were definitively notified that they would not be hired when the eligibility list was promulgated, 667 F.2d at 1083, whereas the petitioners in this case were informed only that it was "not likely" that "qualified" applicants would be selected for further processing. Pet. App. 46a, and respondents did in fact ultimately select some "qualified" applicants beginning in 2001. *Id.*

3. Contrary to respondent's suggestion (Br. in Opp. 22), there is little reason to think that "the circuits are likely to align" without this Court's intervention. Although *Gonzalez* and *Guardians* were decided shortly before *Ricks*, both cases were decided well after this Court first announced the principle that an EEOC charge is not timely unless a "present violation exists," regardless of whether the plaintiff presently feels the effects of a past violation. *Evans*, 431 U.S. at 558 (emphasis omitted); see *Ricks*, 449 U.S. at 257-258 (citing *Evans*). Respondent identifies no relevant change in the law that would cause the courts of appeals to reconsider their approaches to the question presented here.

C. The Question Presented Warrants This Court's Review

The question presented in this case is important and recurring. As petitioners correctly note, the use of employment tests similar to the examination at issue in this case is "widespread." Pet. 19. The conflict among the circuits creates uncertainty about when, and under what circumstances, a plaintiff may challenge such a test under Title VII's disparate-impact provisions, and undermines the uniform application of federal employment discrimination law.

Moreover, if left unreviewed, the court of appeals' decision could undermine enforcement of Title VII's disparate-impact provisions as they apply to such employment tests, as well as to other employment practices that have an unlawful adverse impact on members of protected groups. The decision below could also, as noted above, see p. 15, *supra*, create incentives for plain-

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at 16a. And in *Cox*, unlike this case, the plaintiffs alleged "deliberate[]" discrimination in the promotions process. 220 F.3d at 201.

tiffs to file premature charges, imposing substantial burdens on both the EEOC and the courts.

This case is an appropriate vehicle for resolution of the question presented. Because respondent has not challenged the district court's finding that it engaged in practices made unlawful by the disparate-impact provisions of Title VII, see Pet. App. 28a-42a, the question of timeliness is clearly delineated and outcome-determinative. This Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

(11)

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IN THE

Supreme Court of the United States

ARTHUR L. LEWIS, JR., *et al.*,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ARTHUR L. LEWIS, JR.; GREGORY S. FOSTER, JR.; ARTHUR C. CHARLESTON, III; PAMELA B. ADAMS; WILLIAM R. MUZZALL; PHILIPPE H. VICTOR; CRAWFORD M. SMITH; ALDRON R. REED; and AFRICAN AMERICAN FIRE FIGHTERS LEAGUE OF CHICAGO, INC.; individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF CHICAGO,

Defendant.

No. 98 C 5596

Judge Gottschall

Magistrate Judge Levin

COMPLAINT

Plaintiffs Arthur L. Lewis, Jr.; Gregory S. Foster, Jr.; Arthur C. Charleston, III; Pamela B. Adams; William R. Muzzall; Philippe H. Victor; Crawford M. Smith; Aldron R. Reed; and African American Fire Fighters League of Chicago, Inc. complain of defendant City of Chicago as follows:

1. This action challenges race discrimination by defendant City of Chicago in its hiring of firefighters. The City of Chicago has used and continues to use as

its threshold hiring criterion the results of a 1995 written examination that (a) has a severe disparate impact on African-American firefighter applicants; and (b) is not, and has not been demonstrated to be, job-related in accordance with standards for test validation and business necessity. As a consequence of this test, although approximately 36% of the firefighter applicants who took the 1995 written examination were African-Americans, only approximately 11% of the individuals who scored high enough to advance to the physical performance test have been African-Americans, and only approximately 8% of the individuals hired as firefighters have been African-Americans. Plaintiffs, eight African-American firefighter applicants and the African American Fire Fighters League of Chicago, Inc., bring this suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. ("Title VII").

JURISDICTION, VENUE AND PROCEDURAL PREREQUISITES

2. This Court has jurisdiction pursuant to 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. §§1331 and 1343(4).

3. Venue is proper in this Court, pursuant to 42 U.S.C. §2000e5(f)(3) and 28 U.S.C. §1391(b), because the actions and omissions complained of took place within the Northern District of Illinois.

4. Five of the eight individual named plaintiffs have filed a timely charge with the Equal Employment Opportunity Commission ("EEOC") and have, within 90 days of filing this complaint, received from the EEOC a Notice of Right to Sue, thereby fully complying with the procedural prerequisites to suing

under Title VII. The remaining plaintiffs are entitled to rely on the charges filed by the plaintiffs who did file charges, since they sue over the same discriminatory policies and practices challenged in the charges that were filed.

PARTIES

5. Plaintiffs Arthur L. Lewis, Jr.; Gregory S. Foster, Jr.; Arthur C. Charleston, III; Pamela B. Adams; William R. Muzzall; Philippe H. Victor; Crawford M. Smith; and Aldron R. Reed are African-American residents of the city of Chicago who took and passed the 1995 firefighter written examination that continues to be used as the basis for hiring Chicago firefighters. However, because of their scores on this exam, these plaintiffs have been and continue to be denied the opportunity to advance to the next stage of the hiring process, which is a physical performance test, and have been and continue to be denied hire as firefighters by the City of Chicago.

6. Plaintiff African American Fire Fighters League of Chicago, Inc. ("AAFF") is a non-profit organization made up of African-American firefighters. Since the AAFF was created to promote equality, especially equality for African-Americans, in the workplace, the organization is injured by the adverse impact the Chicago Fire Department hiring examination will have on minority members within the department.

CLASS ALLEGATIONS

7. The individual plaintiffs sue on their own behalf and on behalf of all African-American firefighter applicants who took the 1995 written firefighter examination, but who, as a result of their scores on

that test, have been and continue to be denied the opportunity to take the physical performance test and to be hired as firefighters.

8. Pursuant to Rules 23(a) and 23 (b)(2) of the Federal Rules of Civil Procedure, this action satisfies the requirements to proceed as a class action, as follows:

(a) The proposed class of African-American firefighter applicants numbers in the thousands, and is therefore so numerous that joinder of all members is impracticable.

(b) There are questions of law and fact common to the members of the proposed class, concerning whether the 1995 written examination, as used, has a disparate impact on African-American firefighter applicants, and whether that examination, as used, is job related for the position of firefighter consistent with the legal standards for business necessity.

(c) The claims of the named plaintiffs are typical of the claims of the members of the proposed class, in that each of the individual plaintiffs took the 1995 written examination but has not been allowed to take the physical performance test and has not been hired as a firefighter as a result of his or her score on the 1995 written examination.

(d) The plaintiffs will fairly and adequately protect the interests of the proposed class. They have no conflict of interest with the members of the proposed class, and they are represented by counsel experienced in class action civil rights litigation.

(e) Because the City of Chicago has acted and refused to act on grounds generally applicable to all members of the proposed class, thereby making appropriate final injunctive and declaratory relief with respect to the proposed class as a whole, this class should be certified under Fed.R.Civ.P. 23(b)(2).

9. Defendant City of Chicago is a municipal corporation duly chartered and organized under the laws of the State of Illinois and is an employer within the meaning of 42 U.S.C. §2000e(b). The city is a political subdivision of the State of Illinois, and is a corporate and political body which may sue or be sued.

STATEMENT OF FACTS

10. Since 1996, and continuing through the present time, the City of Chicago has used the results of a 1995 written examination that purports to test for certain cognitive abilities as a threshold screening device for the hiring of firefighters.

11. The City of Chicago set 65 as a cutoff score for passing the written examination. Any applicant scoring below 65 has been and is continuing to be denied any further consideration in the City of Chicago's hiring process.

12. The City of Chicago determined that anyone scoring at or above 65 on the written examination had passed that examination and had demonstrated sufficient ability to be rated "qualified" for the position of firefighter.

13. Although all candidates scoring 65 or above are deemed qualified, the City of Chicago has not al-

lowed all such candidates to advance to the next stage of the hiring process, which is a physical performance test. With the exception of Chicago Fire Department paramedics applying to become firefighters (an exception that benefits a predominantly white group of applicants), the City of Chicago thus far has permitted and is continuing to permit only candidates who achieved a score of 89 or better (including, where applicable, five points for military service) to take the physical performance test.

14. As a result, the overwhelming majority of candidates who passed the written examination and were rated by the City of Chicago as "qualified" based on their scores on the written examination have been and are continuing to be denied the opportunity to compete on the physical performance test in order to be hired.

15. The City of Chicago's written examination, as used by the City of Chicago, has a severe disparate impact on African-American applicants as compared to white applicants.

(a) A total of approximately 26,046 applicants took the written examination when it was administered in July 1995. Of these applicants, approximately 11,649 (45%) are white, and approximately 9,496 (36%) are African-American.

(b) A total of approximately 1782 applicants were scored at the level of 89 or above. Of these applicants, approximately 1,350 (76%) are white, and approximately 204 (11%) are African-American.

(c) Based on these figures, approximately 12% of the white applicants, but only approximately 2% of the African-American applicants, were scored at the level of 89 or above.

16. The African-American "success rate" (i.e., the percentage who were scored at the level of 89 or above) is less than 80% of the white success rate. Accordingly, under §4(D) of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.4(D), the City of Chicago's written examination, as used by the City of Chicago, has an adverse impact on African-Americans.

17. The City of Chicago's decision to use a pass/fail cutoff of 65 has a severe disparate impact on African-American applicants as compared to white applicants, and the City of Chicago's decision to use 89 as a threshold for advancing in the hiring process has a severe disparate impact on African-Americans who passed the examination.

(a) Of the approximately 11,649 white applicants who took the written examination, approximately 10,877, or 93%, passed. Of the approximately 9,496 African-American applicants who took the written examination, approximately 6,855, or 72%, passed.

(b) The African-American pass rate is less than 80% of the white pass rate. Accordingly, under §4(D) of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.4(D), the City of Chicago's written examination, used with a pass/fail cut-off score of 65, has an adverse impact on African-Americans.

(c) Of the approximately 10,877 white applicants who passed the written examination, approximately 1350, or 12%, were scored at the level of 89 or above. Of the approximately 6,855 African-American applicants who passed the written examination, approximately 204, or 3%, were scored at the level of 89 or above.

(d) The rate at which African-Americans who passed the examination were scored at the level of 89 or above is less than 80% of the corresponding rate for whites. Accordingly, under §4(D) of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.4(D), the City of Chicago's written examination, as used by the City of Chicago, has an adverse impact on African-Americans who passed the examination.

18. The only exception to the City of Chicago's use of a score of 89 (adjusted for military service) as a threshold screening device has been made for the benefit of Chicago Fire Department ("CFD") paramedics, the overwhelming majority of whom are white. Each time a new class of firefighters is hired into the Fire Academy, a certain number of CFD paramedics are included. CFD paramedics who passed the written examination (i.e., those with scores of at least 65) have been and are continuing to be permitted to take the physical performance test based solely on their paramedic seniority, without regard to their scores on the written examination. As a consequence of this policy, approximately 68 CFD paramedics have been hired as firefighters. Approximately 57 (84%) have been white; only three

(4%) have been African-American. Many of the approximately 57 white CFD paramedics hired as firefighters scored below 89 on the written examination.

19. The City of Chicago's written examination, at least as that examination has been and continues to be used by the City of Chicago, is not job related for the position of firefighter and is not justified by business necessity. It is not, and has not been shown to be, a valid measure of which candidates are likely to perform best as firefighters. This is so, in part, because the written examination purports to test for only four of the 46 abilities that were identified as essential to the job of firefighter by the City of Chicago's own job analysis

20. In developing its firefighter examination, the City of Chicago conducted a job analysis that purported to identify abilities that are essential to firefighter job performance. This job analysis also purported to rank these abilities in order of their importance to firefighter job performance.

21. According to the City of Chicago's job analysis, the job of firefighter requires a whole range of abilities, including physical abilities, cognitive abilities, and other crucial abilities.

22. According to the City of Chicago's job analysis, the ability most important to the job of firefighter is the ability to make decisions quickly when under pressure. The next most important ability is the ability to remain calm and follow directions when under pressure in an emergency. The third most important ability is the ability to work as part of a team to accomplish a task. Of the ten next most important abilities, seven are physical abilities, and

only one is what the City of Chicago characterizes as a cognitive ability.

23. The test the City of Chicago used as a threshold screening device did not attempt to measure the abilities its own job analysis concluded are most important to performance as a firefighter. Instead, the City of Chicago's written examination was designed to test only for four cognitive abilities. Only one of these four abilities – the ability to understand oral instructions – ranks among the 15 abilities deemed by the City of Chicago to be most important to the job of firefighter. Indeed, one of the four abilities tested for on the written examination – the ability to take notes – is ranked by the City of Chicago's own job analysis as the very least important of the 46 firefighter abilities.

24. Because the written examination tests for such a narrow range of abilities, and because it does not test for the abilities most important to the performance of the job of firefighter, the City of Chicago's testing procedure – under which (except for CFD paramedics) only those who scored among the highest scorers on the written examination are being permitted to take the physical performance test, and under which no attempt is made to test for non-cognitive, non-physical abilities essential to job performance – does not identify the applicants who will make the best firefighters. For this and other reasons, the City of Chicago's written examination, as used by the City of Chicago, is not, and has not been shown to be, valid and job-related and justified by business necessity.

25. The City of Chicago has not validated either the use of 65 as a pass/fail cutoff, or the use of 89 as a threshold screening requirement. The use of 65 as a pass/fail cutoff and the use of 89 as a threshold screening device are not, and have not been shown by the City of Chicago to be, valid and job-related and justified by business necessity.

26. The City of Chicago's past experience demonstrates that paper-and-pencil hiring and promotion tests used by the Chicago Fire Department and the Chicago Police Department almost invariably have a disparate impact against African-Americans. Knowing that in all likelihood its written firefighter examination would have a disparate impact on African-Americans, the City of Chicago still made the decision to permit only those who scored among the highest scorers on the written examination to take the physical performance test. The City of Chicago adhered to this decision even after it learned that the written examination did, in fact, have a severe disparate impact on African-American applicants.

27. At least from the time that the City of Chicago learned the results of the written examination, the City of Chicago knew or should have known that the disparate impact of the written examination could be reduced using the test results in a different manner. For example, the city of Chicago knew or should have known that the disparate impact of the written examination could have been substantially reduced by (a) permitting all applicants who received a passing score on that examination to take the physical performance test; or (b) selecting at random from among all applicants who passed the written examination to determine which applicants would be per-

mitted to take the physical performance test. Moreover, the City of Chicago has no acceptable evidence that pursuing either of these alternative hiring processes would lead to the hiring of persons less able to perform the job of firefighter.

28. As a consequence of the City of Chicago's overall hiring process, only approximately 8% of the firefighters hired as a result of the 1995 examination have been African-American, although approximately 36% of the applicants who took that examination were African-American.

29. Unless rectified, this minimal rate of hiring of African-Americans will perpetuate for years to come the disproportionately low number of African-Americans in the Chicago Fire Department, that has been the legacy of years of proven and admitted past discrimination by the City of Chicago.

VIOLATION OF LAW

30. By the actions and omissions complained of in this complaint, the City of Chicago has violated, and is continuing to violate, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

PRAYER FOR RELIEF

31. WHEREFORE, plaintiffs pray that the Court:

(a) certify the class they seek to represent;

(b) order appropriate injunctive relief remedying the City of Chicago's past and continuing discriminatory hiring of firefighters, by requiring the City of Chicago: (1) to cease its discriminatory use of its written examination; (2) to hire forthwith an appropriate number of African-American firefight-

ers; and (3) to refrain in the future from the use of hiring tests which have disparate impact on African-American applicants and which have not been shown to be valid and job-related and required by business necessity;

(c) award constructive seniority to the African-American firefighters hired as a result of this litigation;

(d) award backpay together with prejudgment interest;

(e) award attorneys' fees, expert fees, and the costs and expenses of this litigation; and

(f) award such other and further relief as may be appropriate.

Respectfully submitted,

_____

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ARTHUR L. LEWIS, JR.; GREGORY S. FOSTER, JR.; ARTHUR C. CHARLESTON, III; PAMELA B. ADAMS; WILLIAM R. MUZZALL; PHILIPPE H. VICTOR; CRAWFORD M. SMITH; ALDRON R. REED; and AFRICAN AMERICAN FIRE FIGHTERS LEAGUE OF CHICAGO, INC.; individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF CHICAGO,

Defendant.

No. 98 C 5596

Judge Gottschall

Magistrate Judge Levin

DEFENDANT CITY OF CHICAGO'S ANSWER TO COMPLAINT

Defendant City of Chicago, by its attorney, Brian L. Crowe, Corporation Counsel of the City of Chicago, responds as follows to the plaintiffs' complaint:

1. This action challenges race discrimination by defendant City of Chicago in its hiring of firefighters. The City of Chicago has used and continues to use as its threshold hiring criterion the results of a 1995 written examination that (a) has a severe disparate

impact on African-American firefighter applicants; and (b) is not, and has not been demonstrated to be, job-related in accordance with standards for test validation and business necessity. As a consequence of this test, although approximately 36% of the firefighter applicants who took the 1995 written examination were African-Americans, only approximately 11% of the individuals who scored high enough to advance to the physical performance test have been African-Americans, and only approximately 8% of the individuals hired as firefighters have been African-Americans. Plaintiffs, eight African-American firefighter applicants and the African American Fire Fighters League of Chicago, Inc., bring this suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. ("Title VII").

ANSWER: Defendant admits that this action purports to bring a disparate impact claim, on the basis of race, under Title VII of the Civil Rights Act of 1964, as amended but denies that the City has violated plaintiffs' rights under Title VII. Defendant admits that it has used and continues to use results of the 1995 fire fighter entrance examination as part of its fire fighter hiring process. Defendant states that part of the 1995 fire fighter entrance test was written and part was based on a videotaped component. Defendant admits that approximately 36 percent of the 1995 fire fighter applicants are African-American, that approximately 11 percent of the well-qualified group is African-American and that approximately 8 percent of the persons hired to date from the results of the 1995 fire fighter test are African-American. Plaintiffs do not define their use of the phrase "severe adverse impact" nor do they indi-

cate in this paragraph which aspects of the 1995 fire fighter examination process had such impact; therefore defendant is without knowledge or information sufficient to form a belief as to the truth of that allegation. Defendant denies that plaintiff African American Fire Fighters League of Chicago, Inc. has suffered any injury arising from the events alleged in this complaint.

JURISDICTION, VENUE AND PROCEDURAL PREREQUISITES

2. This Court has jurisdiction pursuant to 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. §§ 1331 and 1343(4).

ANSWER: Defendant admits this Court has jurisdiction over this matter.

3. Venue is proper in this Court, pursuant to 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1391(b), because the actions and omissions complained of took place within the Northern District of Illinois.

ANSWER: Defendant admits that venue is proper in this Court. Defendant denies the remaining allegations of this paragraph.

4. Five of the eight individual named plaintiffs have filed a timely charge with the Equal Employment Opportunity Commission (:EEOC") and have, within 90 days of filing this complaint, received from the EEOC a Notice of Right to Sue, thereby fully complying with the procedural prerequisites to suing under Title VII. The remaining plaintiffs are entitled to rely on the charges filed by the plaintiffs who did file charges, since they sue over the same dis-

criminatory policies and practices challenged in the charges that were filed.

ANSWER: Defendant denies that any of the named plaintiffs filed a timely charge with the EEOC and further denies that plaintiffs have complied with the procedural prerequisites to suing under Title VII. Defendant denies the remaining allegations in paragraph 4.

PARTIES

5. Plaintiffs Arthur L. Lewis, Jr.; Gregory S. Foster, Jr.; Arthur C. Charleston, III; Pamela B. Adams; William R. Muzzall; Philippe H. Victor; Crawford M. Smith; and Aldron R. Reed are African-American residents of the City of Chicago who took and passed the 1995 firefighter written examination that continues to be used as the basis for hiring Chicago firefighters. However, because of their scores on this exam, these plaintiffs have been and continue to be denied the opportunity to advance to the next stage of the hiring process, which is a physical performance test, and have been and continue to be denied hire as firefighters by the City of Chicago.

ANSWER: Defendant admits that the named plaintiffs are African-Americans who took and passed the 1995 fire fighter written examination and that they have not been hired as Chicago fire fighters. Defendant is without knowledge or information sufficient to form a belief as to the truth of whether plaintiffs currently are residents of the City of Chicago. Defendant denies the remaining allegations of this paragraph.

6. Plaintiff African American Fire Fighters League of Chicago, Inc. ("AAFF") is a non-profit organization made up of African-American firefighters. Since the AAFF was created to promote equality, especially equality for African-Americans, in the workplace, the organization is injured by the adverse impact the Chicago Fire Department hiring examination will have on minority members within the department.

ANSWER: Defendant admits that plaintiff African American Fire Fighters League of Chicago, Inc. ("AAFF") is a non-profit organization made up of African-American fire fighters. Defendant denies that the AAFF has been injured by the events alleged in this complaint.

CLASS ALLEGATIONS

7. The individual plaintiffs sue on their own behalf and on behalf of all African-American firefighter applicants who took the 1995 written firefighter examination, but who, as a result of their scores on that test, have been and continue to be denied the opportunity to take the physical performance test and to be hired as firefighters.

ANSWER: Defendant admits that the individual plaintiffs purport to sue on their own behalf and on behalf of the class of individuals described in this paragraph. Defendant denies any remaining allegations of this paragraph.

8. Pursuant to Rules 23(a) and 23(b)(2) of the Federal rules of Civil Procedure, this action satisfies the requirements to proceed as a class action, as follows:

(a) The proposed class of African-American firefighter applicants numbers in the thousands, and is therefore so numerous that joinder of all members is impracticable.

(b) There are questions of law and fact common to the members of the proposed class, concerning whether the 1995 written examination, as used, has a disparate impact on African-American firefighter applicants, and whether that examination, as used, is job related for the position of firefighter consistent with the legal standards for business necessity.

(c) The claims of the named plaintiffs are typical of the claims of the members of the proposed class, in that each of the individual plaintiffs took the 1995 written examination but has not been allowed to take the physical performance test and has not been hired as a firefighter as a result of his or her score on the 1995 written examination.

(d) The plaintiffs will fairly and adequately protect the interests of the proposed class. They have no conflict of interest with the members of the proposed class, and they are represented by counsel experienced in class action civil rights litigation.

(e) Because the City of Chicago has acted and refused to act on grounds generally applicable to all members of the proposed class, thereby making appropriate final injunctive and declaratory relief with respect to the proposed class as a whole, this class should be certified under Fed.R.Civ.P. 23(b)(2).

ANSWER: Defendant denies that this action satisfies the requirements to proceed as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. Moreover, defendant states that the plaintiffs purport to represent two distinct classes of African-American applicants, those who passed the 1995 examination and those who did not pass the examination. These classes of individuals raise different sets of issues regarding the examination and have potentially conflicting interests. Defendant agrees that the class is represented by experienced counsel, but notes that two of the lead attorneys for the plaintiff class represented the City of Chicago in various matters related to hiring and promotions in the Chicago Fire Department from approximately 1984 to 1989 and that this former representation may disqualify these attorneys in this matter.

9. Defendant City of Chicago is a municipal corporation duly chartered and organized under the laws of the State of Illinois and is an employer within the meaning of 42 U.S.C. § 2000e(b). The city is a political subdivision of the State of Illinois, and is a corporate and political body which may sue or be sued.

ANSWER: Defendant admits the allegations in this paragraph.

STATEMENT OF FACTS

10. Since 1996, and continuing through the present time, the City of Chicago has used the results of a 1995 written examination that purports to test for certain cognitive abilities as a threshold screening device for the hiring of firefighters.

ANSWER: Defendant states that since 1996 and continuing to the present time, it has used the results of the 1995 fire fighter entrance examination as a part of its process for hiring probationary fire fighters in the Chicago Fire Department. Defendant also states that the examination was developed with the intention of measuring certain cognitive abilities as described in the technical report which outlined the test development process.

11. The City of Chicago set 65 as a cutoff score for passing the written examination. Any applicant scoring below 65 has been and is continuing to be denied any further consideration in the City of Chicago's hiring process.

ANSWER: Defendant admits that 65 was the passing score on the 1995 examination. Defendant further states that in January 1996 applicants who scored below 65 were informed in writing that they would not be considered for hire in the 1995 examination process. Defendant denies the remaining allegations in paragraph 11.

12. The City of Chicago determined that anyone scoring at or above 65 on the written examination had passed that examination and had demonstrated sufficient ability to be rated "qualified" for the position of firefighters.

ANSWER: Defendant states that applicants scoring at or above 65 on the 1995 fire fighter entrance examination passed that examination and were put into two categories, a "Qualified" group and a "Well-Qualified" group. The remaining allegations in paragraph 12 are unreasonably vague; therefore de-

fendant is without knowledge or information sufficient to form a belief as to the truth of those allegations.

13. Although all candidates scoring 65 or above are deemed qualified, the City of Chicago has not allowed all such candidates to advance to the next stage of the hiring process, which is a physical performance test. With the exception of Chicago fire Department paramedics applying to become firefighters (an exception that benefits a predominantly white group of applicants), the City of Chicago thus far has permitted and is continuing to permit only candidates who achieved a score of 89 or better (including, where applicable, five points for military service) to take the physical performance test.

ANSWER: Defendant states that only candidates in the Well-Qualified group (and Chicago Fire Department paramedics as described below) have been or will be considered in the subsequent stages of the 1995 hiring process and that one of those stages is a physical abilities test. Defendant also states that the Well-Qualified group includes approximately 300 applicants who scored between 84 and 88 on the 1995 examination and received 5 points for their service in the United States armed services. Since approximately the mid-1980s the collective bargaining agreement between the City and Chicago Fire Fighters Union Local No. 2 has included a provision which requires that each fire fighter class include a certain percentage of Chicago Fire Department paramedics whose names appear on the relevant fire fighter eligible list. Eligible paramedics are identified on the basis of seniority, not race or national origin. The remaining allegations in paragraph 13

are unreasonably vague; therefore defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations.

14. As a result, the overwhelming majority of candidates who passed the written examination and were rated by the City of Chicago as "qualified" based on their scores on the written examination have been and are continuing to be denied the opportunity to compete on the physical performance test in order to be hired.

ANSWER: Plaintiffs do not define the phrase "overwhelming majority of candidates"; therefore defendant is without knowledge or information sufficient to form a belief as to the truth of that allegation. Defendant states, however, that the majority of the candidates in the Qualified group will not be hired from the results of this examination. Defendant also incorporates its response to paragraph 13 as part of its response to paragraph 14. Defendant denies any remaining allegations in paragraph 14.

15. The City of Chicago's written examination, as used by the City of Chicago, has a severe disparate impact on African-American applicants as compared to white applicants.

(a) A total of approximately 26,046 applicants took the written examination when it was administered in July 1995. Of these applicants, approximately 11,649 (45%) are white, and approximately 9,496 (36%) are African-American.

(b) A total of approximately 1782 applicants were scored at the level of 89 or above. Of these applicants, approximately 1,350 (76%) are

white, and approximately 204 (11%) are African-American.

(c) Based on these figures, approximately 12% of the white applicants, but only approximately 2% of the African-American applicants, were scored at the level of 89 or above.

ANSWER: Defendant states that plaintiffs do not define the phrase "severe adverse impact" and that defendant is without knowledge or information sufficient to form a belief as to the plaintiffs' intended meaning of that phrase. With the understanding that the above allegations are based on approximations, however, defendant admits the remaining allegations in paragraph 15.

16. The African-American "success rate" (i.e., the percentage who were scored at the level of 89 or above) is less than 80% of the white success rate. Accordingly, under § 4(D) of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D), the City of Chicago's written examination, as used by the City of Chicago, has an adverse impact on African-Americans.

ANSWER: Defendant admits the allegations in paragraph 16.

17. The City of Chicago's decision to use a pass/fail cutoff of 65 has a severe disparate impact on African-American applicants as compared to white applicants, and the City of Chicago's decision to use 89 as a threshold for advancing in the hiring process as a severe disparate impact on African-Americans who passed the examination.

(a) Of the approximately 11,649 white applicants who took the written examination, approximately 10,877, or 93%, passed. Of the approximately 9,496 African-American applicants who took the written examination, approximately 6,855, or 72%, passed.

(b) The African-American pass rate is less than 80% of the Accordingly, under § 4(D) of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D), the City of Chicago's written examination, used with a pass/fail cut-off score of 65, has an adverse impact on African-Americans.

(c) Of the approximately 10,877 white applicants who passed the written examination, approximately 1350, or 12%, were scored at the level of 89 or above. Of the approximately 6,855 African-American applicants who passed the written examination, approximately 204, or 3%, were scored at the level of 89 or above.

(d) The rate at which African-Americans who passed the examination were scored at the level of 89 or above is less than 80% of the corresponding white. Accordingly, under § 4(D) of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D), the City of Chicago's written examination, as used by the city of Chicago, has an adverse impact on African-Americans who passed the examination.

ANSWER: Defendant states that plaintiffs do not define the phrase "severe adverse impact" and that

defendant is without knowledge or information sufficient to form a belief as to the plaintiffs' intended meaning of that phrase. With the understanding that the above allegations are based on approximations, however, defendant admits the remaining allegations in paragraph 17.

18. The only exception to the City of Chicago's use of a score of 89 (adjusted for military service) as a threshold screening device has been made for the benefit of Chicago Fire Department ("CFD") paramedics, the overwhelming majority of whom are white. Each time a new class of firefighters is hired into the Fire Academy, a certain number of CFD paramedics are included. CFD paramedics who passed the written examination (i.e., those with scores of at least 65) have been and are continuing to be permitted to take the physical performance test based solely on their paramedic seniority, without regard to their scores on the written examination. As a consequence of this policy, approximately 68 CFD paramedics have been hired as firefighters. Approximately 57 (84%) have been white; only three (4%) have been African-American. Many of the approximately 57 white CFD paramedics hired as firefighters scored below 89 on the written examination.

ANSWER: Defendant incorporates by reference its response to paragraph 13 as part of its response to paragraph 18. Defendant further states that to date 75 paramedics from the qualified category have been included in fire fighter classes and that 63 (84 percent) are white and 5 (6 percent) are African-American. The remaining allegations in paragraph 18 are unreasonably vague; therefore defendant is

without knowledge or information sufficient to form a belief as to the truth of those allegations.

19. The City of Chicago's written examination, at least as that examination has been and continues to be used by the City of Chicago, is not job related for the position of firefighter and is not justified by business necessity. It is not, and has not been shown to be, a valid measure of which candidates are likely to perform best as firefighters. This is so, in part, because the written examination purports to test for only four of the 46 abilities that were identified as essential to the job of firefighter by the City of Chicago's own job analysis.

ANSWER: Defendant states that plaintiffs' allegations regarding the job analysis are inaccurate and incomplete. Therefore, defendant denies the allegations in paragraph 19.

20. In developing its firefighter examination, the City of Chicago conducted a job analysis that purported to identify abilities that are essential to firefighter job performance. This job analysis also purported to rank these abilities in order of their importance to firefighter job performance.

ANSWER: Defendant states that plaintiffs' allegations regarding the job analysis are inaccurate and incomplete. Therefore, defendant denies the allegations in paragraph 20.

21. According to the City of Chicago's job analysis, the job of firefighter requires a whole range of abilities, including physical abilities, cognitive abilities, and other crucial abilities.

ANSWER: Defendant states that plaintiffs' allegations regarding the job analysis are unreasonably vague, inaccurate and incomplete. Therefore, defendant denies the allegations in paragraph 21.

22. According to the City of Chicago's job analysis, the ability most important to the job of firefighter is the ability to make decisions quickly when under pressure. The next most important ability is the ability to remain calm and follow directions when under pressure in an emergency. The third most important ability is the ability to work as part of a team to accomplish a task. Of the ten next most important abilities, seven are physical abilities, and only one is what the City of Chicago characterizes as a cognitive ability.

ANSWER: Defendant states that plaintiffs' allegations regarding the job analysis are inaccurate and incomplete. Therefore, defendant denies the allegations in paragraph 22.

23. The test the City of Chicago used as a threshold screening device did not attempt to measure the abilities its own job analysis concluded are most important to performance as a firefighter. Instead, the City of Chicago's written examination was designed to test only for four cognitive abilities. Only one of these four abilities – the ability to understand oral instructions – ranks among the 15 abilities deemed by the City of Chicago to be most important to the job of firefighters. Indeed, one of the four abilities tested for on the written examination – the ability to take notes – is ranked by the City of Chicago's own job analysis as the very least important of the 46 firefighter abilities.

ANSWER: Defendant admits that the 1995 fire fighter entrance examination was designed to measure four abilities as identified in the job analysis. The remaining allegations regarding the job analysis are inaccurate and incomplete. Therefore, defendant denies the remaining allegations in paragraph 23.

24. Because the written examination tests for such a narrow range of abilities, and because it does not test for the abilities most important to the performance of the job of firefighters the City of Chicago's testing procedure – under which (except for CFD paramedics) only those who scored among the highest scorers on the written examination are being permitted to take the physical performance test, and under which no attempt is made to test for non-cognitive, non-physical abilities essential to job performance – does not identify the applicants who will make the best firefighters. For this and other reasons, the City of Chicago's written examination, as used by the City of Chicago, is not, and has not been shown to be, valid and job-related and justified by business necessity.

ANSWER: Defendant states that plaintiffs' allegations regarding the job analysis are unreasonably vague, inaccurate and incomplete. Therefore, defendant denies the allegations in paragraph 24.

25. The City of Chicago has not validated either the use of 65 as a pass/fail cutoff, or the use of 89 as a threshold screening requirement. The use of 65 as a pass/fail cutoff and the use of 89 as a threshold screening device are not, and have not been shown

by the City of Chicago to be, valid and job-related and justified by business necessity.

ANSWER: Defendant denies the assumption in paragraph 25 that Title VII requires the validation of cut scores. Defendant further states that plaintiffs' reference to applicable law is inaccurate. Defendant denies the remaining allegations in paragraph 25.

26. The City of Chicago's past experience demonstrates that paper-and-pencil hiring and promotion tests used by the Chicago Fire Department and the Chicago Police Department almost invariably have a disparate impact against African-Americans. Knowing that in all likelihood its written firefighter examination would have a disparate impact on African-Americans, the City of Chicago still made the decision to permit only those who scored among the highest scorers on the written examination to take the physical performance test. The City of Chicago adhered to this decision even after it learned that the written examination did, in fact, have a severe disparate impact on African-American applicants.

ANSWER: Plaintiffs fail to identify the examinations to which they refer in paragraph 26; therefore defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations. Defendant further states that the City had not administered an examination of this kind prior to the administration of the 1995 fire fighter examination and that it expected that the examination would have little or no adverse impact. Defendant denies the remaining allegations in paragraph 26.

27. At least from the time that the City of Chicago learned the results of the written examination, the City of Chicago knew or should have known that the disparate impact of the written examination could be reduced using the test results in a different manner. For example, the City of Chicago knew or should have known that the disparate impact of the written examination could have been substantially reduced by (a) permitting all applicants who received a passing score on that examination to take the physical performance test; or (b) selecting at random from among all applicants who passed the written examination to determine which applicants would be permitted to take the physical performance test. Moreover, the City of Chicago has no acceptable evidence that pursuing either of these alternative hiring processes would lead to the hiring of persons less able to perform the job of firefighter.

ANSWER: Defendant is without knowledge or information sufficient to form a reasonable belief as to the truth of the allegations in paragraph 27.

28. As a consequence of the City of Chicago's overall hiring process, only approximately 8% of the firefighters hired as a result of the 1995 examination have been African-American, although approximately 36% of the applicants who took that examination were African-American.

ANSWER: Defendant states that approximately 9.5% of the fire fighters hired as a result of the 1995 examination have been African-American. Defendant admits that approximately 36% of the applicants who took the examination were African-American. Defendant is without knowledge or in-

formation sufficient to form a belief as to the truth of the remaining allegations in paragraph 28.

29. Unless rectified, this minimal rate of hiring of African-Americans will perpetuate for years to come the disproportionately low number of African-Americans in the Chicago Fire Department, that has been the legacy of years of proven and admitted past discrimination by the City of Chicago.

ANSWER: Defendant admits that the City has admitted to past discrimination against African-Americans in the Chicago Fire Department and that the City continues to observe the lingering effects of that discrimination at certain ranks in the Department. Defendant denies any inference that the disparate impact of the 1995 fire entrance examination was intentional. The remaining allegations in this paragraph are unreasonably vague; therefore defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations.

VIOLATION OF LAW

30. By the actions and omissions complained of in this complaint, the City of Chicago has violated, and is continuing to violate, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

ANSWER: Defendant denies the allegations in this paragraph.

ADDITIONAL DEFENSES

1. Plaintiffs failed to file timely charges of discrimination. Therefore, plaintiffs have failed to satisfy the administrative prerequisites to filing this action and the action should be dismissed.

2. The 1995 firefighter examination was developed and used in compliance with Title VII of the 1964 Civil Rights Act, as amended.

Respectfully submitted,

BRIAN L. ROWE
Corporation Counsel of the
City of Chicago

BY: _____
NAOMI AVENDANO
Senior Attorney-
Supervisor

VALERIE DEPIES
HARPER
Assistant Corporation
Counsel
30 North LaSalle Street
Room 1020
Chicago, Illinois 60602
312-744-4026

FIREFIGHTER EXAMINATION
FINAL SCORE NOTICE

January 1996

ARTHUR L. LEWIS
8135 S JUSTINE
CHICAGO, IL 60620

DEAR ARTHUR LEWIS: SS#: XXXXXXXXX

You have achieved a score of 87 out of a possible 100 on the written/video portion of Firefighter Examination #39501. This means that you have been rated "Qualified" for the position of Firefighter. While this means you have passed the examination, you are not in the group of candidates who received a rating of "Well Qualified" on the examination. Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

If you have served in the armed forces of the United States on active duty continually for six months and were not dishonorably discharged, you may qualify for Veteran's Preference. Qualified veterans are entitled to have 5 points added to their passing score. If you are a qualified veteran, these additional points will place you in the "Well Qualified" category of the eligible list for this examination. Veteran's Preference Request forms are available at

the Department of Personnel Office, Room 100, City Hall. Your completed request form and documents must be submitted within thirty days of the date of this letter. If you need further information regarding Veteran's Preference, call the City of Chicago Department of Personnel at 744-4976.

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In order to maintain the security of this examination process, candidates are not permitted to review the questions and answers or score calculations from this examination.

THIS WILL BE THE LAST COMMUNICATION FROM ARTHUR ANDERSEN. ALL FUTURE COMMUNICATIONS YOU RECEIVE WILL BE FROM THE CHICAGO FIRE DEPARTMENT – PERSONNEL DIVISION AND THE CITY OF CHICAGO DEPARTMENT OF PERSONNEL.

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FIREFIGHTER EXAMINATION
FINAL SCORE NOTICE

January 1996

GREGORY S. FOSTER JR
8316 S WABASH AV
CHICAGO, IL 60619

DEAR GREGORY FOSTER JR: SS#: XXXXX[illegible]XX
You have achieved a score of 82 out of a possible 100 on the written/video portion of Firefighter Examination #39501. This means that you have been rated "Qualified" for the position of Firefighter. While this means you have passed the examination, you are not in the group of candidates who received a rating of "Well Qualified" on the examination. Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

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FIREFIGHTER EXAMINATION
FINAL SCORE NOTICE

January 1996

ARTHUR C. CHARLESTON III
6129 S WABASH AVENUE
CHICAGO, IL 60637

DEAR ARTHUR CHARLESTON III: SS#:XXXXXX

You have achieved a score of 82 out of a possible 100 on the written/video portion of Firefighter Examination #39501. This means that you have been rated "Qualified" for the position of Firefighter. While this means you have passed the examination, you are not in the group of candidates who received a rating of "Well Qualified" on the examination. Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

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FIREFIGHTER EXAMINATION
FINAL SCORE NOTICE

January 1996

PAMELA B. ADAMS
6117 S RHODES AVENUE
CHICAGO, IL 60637

DEAR PAMELA ADAMS: SS#: XXXXXXXXX

You have achieved a score of 74 out of a possible 100 on the written/video portion of Firefighter Examination #39501. This means that you have been rated "Qualified" for the position of Firefighter. While this means you have passed the examination, you are not in the group of candidates who received a rating of "Well Qualified" on the examination. Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

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FIREFIGHTER EXAMINATION
FINAL SCORE NOTICE

January 1996

WILLIAM R. MUZZALL
3620 S RHODES
CHICAGO, IL 60653

DEAR WILLIAM MUZZALL: SS#: XXXXXXXXX

You have achieved a score of 87 out of a possible 100 on the written/video portion of Firefighter Examination #39501. This means that you have been rated "Qualified" for the position of Firefighter. While this means you have passed the examination, you are not in the group of candidates who received a rating of "Well Qualified" on the examination. Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

If you have served in the armed forces of the United States on active duty continually for six months and were not dishonorably discharged, you may qualify for Veteran's Preference. Qualified veterans are entitled to have 5 points added to their passing score. If you are a qualified veteran, these additional points will place you in the "Well Qualified" category of the eligible list for this examination. Veteran's Preference Request forms are available at

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FIREFIGHTER EXAMINATION
FINAL SCORE NOTICE

January 1996

PHILIPPE H. VICTOR
6933 EAST END
CHICAGO, IL 60649

DEAR PHILIPPE VICTOR: SS#: XXXXXXXXX

You have achieved a score of 85 out of a possible 100 on the written/video portion of Firefighter Examination #39501. This means that you have been rated "Qualified" for the position of Firefighter. While this means you have passed the examination, you are not in the group of candidates who received a rating of "Well Qualified" on the examination. Due to the large number of candidates who received higher scores and were rated as "Well Qualified," are based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

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FIREFIGHTER EXAMINATION
FINAL SCORE NOTICE

January 1996

CRAWFORD M. SMITH
1637 E 91 PLACE
CHICAGO, IL 60617

DEAR CRAWFORD SMITH: SS#: XXXXXXXXX

You have achieved a score of 70 out of a possible 100 on the written/video portion of Firefighter Examination #39501. This means that you have been rated "Qualified" for the position of Firefighter. While this means you have passed the examination, you are not in the group of candidates who received a rating of "Well Qualified" on the examination. Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

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FIREFIGHTER EXAMINATION
FINAL SCORE NOTICE

January 1996

ALDRON R. REED
8133 S SHORE DRIVE
CHICAGO, IL 60617

DEAR ALDRON REED: SS#: XXXXXXXXX

You have received a score of 71 out of a possible 100 on the written/video portion of Firefighter Examination #39501. This means that you have been rated "Qualified" for the position of Firefighter. While this means you have passed the examination, you are not in the group of candidates who received a rating of "Well Qualified" on the examination. Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

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KEEP THIS NOTICE FOR YOUR RECORDS!

News Release
January 26, 1996

Mayor's Press Office
Contact: (312) 744-3334

Office of the Mayor
Richard M. Daley
Mayor

CITY TO DEVELOP PROCEDURES FOR MERIT PROMOTIONS

ANNOUNCES RESULTS OF POLICE AND FIRE EXAMS

Emphasizing his strong commitment to a professional and diverse government that reflect the people it serves, Mayor Richard M. Daley today announced the creation of two new task forces which will review alternatives to promoting strictly by written examination. These task forces, whose members will be named at a later date, will continue the Mayor's efforts to enhance the professionalism and diversity of the police and fire departments.

They will explore the feasibility of methods such as merit promotions, consideration of years of service in current rank, performance and leadership qualities, oral review boards, and others. Their recommendations will guide future tests and promotions.

This announcement came as the City released police and fire exam results that the Mayor termed "disappointing."

"After all our efforts to improve diversity, these tests results are disappointing," said Daley. "I want to commend those who did well on the tests; I know

they are well-qualified and will serve the people of Chicago well. However, it is my strong belief that a government must be reflective of the people it serves. And it is increasingly clear to me that written tests alone are not the best criteria for achieving a qualified and diverse workforce. Good police-work requires extraordinary people skills and judgment—leadership qualities not easily displayed in written examinations."

Daley added that while he was not satisfied with the results, in fairness to the candidates who took the exams, the city would move ahead with promotions and hirings while it studies new procedures. The lists are being taken down as soon as these promotions are made.

"For the past six years, we have sought out the advice of experts across the country. We have taken politics out of the process and adopted a number of recommendations to make our system fair, legal and practical. Despite our best efforts, the results have been disappointing. But we are not giving up. Our police officers and firefighters put their lives on the line for us every day. In addition to our support and respect, they deserve a fair chance at advancement within their departments. And our citizens deserve a workforce that represents their communities and is committed to serving them. We have to do better."

Over the next few months, police sergeant and lieutenant promotions will be made from the current lists. These are the last promotions that will be made from these lists. However, in keeping with the Mayor's goal of having promotional exams more fre-

quently, new exams will be developed for promotions beyond 1996.

The City also has decided not to petition the Illinois Supreme Court for leave to appeal the Appellate Court's decision regarding lieutenants promotions. The court ruled against the city's effort to make merit promotions saying that the city should have announced the merit process prior to administering the test. In the future the city will make it clear, in advance, that factors such as merit will be a consideration in all testing procedures.

The city expects to promote 296 more sergeants and up to 54 more lieutenants over the next few months. Approximately 15 percent of officers scheduled to be promoted to sergeant are minorities. The breakdown is as follows: 252 white, 28 African-american, 12 Hispanic, and four other. A total of 76 women are among those expected to be promoted to the rank of sergeant. With lieutenants, 51 white, two African-american and one Hispanic officer are expected to be promoted. 13 of the 54 lieutenants candidates are women.

"I intend to work closely with the new task force so that in the future we can better meet our goal of a police force whose rank and leadership reflect the city they serve," said Police Superintendent Matt Rodriguez. "I know that there are officers out there who would make fine leaders. Tests do not tell the whole story; policing skills, as well as leadership abilities, should also come into the equation when promotions are being considered."

This week, the city will also send letters to firefighter candidates, notifying them of their scores on

the recent entry exam. The city will use the same method it has successfully used to hire police officers. Based on exam results, candidates are rated "well qualified," "qualified," and "not recommended."

Of the more than 26,000 people who took this test, 1782 (or 6.8 percent) have been deemed "well-qualified" and each will be contacted by the city, in random order, for the next round of tests. Firefighter candidates still need to pass drug, medical and physical fitness tests, as well as background checks, before being admitted to the Fire Academy.

The "well-qualified" group is 92.6 male and 7.3 percent female. It is 75.8 percent white, and 24.2 percent minority—11.5 percent African-american, 9.9 percent Hispanic, 1.5 percent Asian, and 1.3 percent other.

"While we were successful in our efforts to recruit a diverse pool of firefighter candidates and develop a fair test, we are still not satisfied with the overall results," said Corporation Counsel Susan Sher. "We would like to see much more progress at the entry level and will work to refine and improve our testing procedures."

The city expects to hire approximately 600 entry level firefighters over the next three years. The first class of about 100 candidates should be admitted to the Academy by late spring for a 90 day training period. In accordance with the Mayor's promise to offer entry exams more frequently, the city intends to offer a new test in three years.

# # #

Fire, Police Exams Leave Racial Divide; Daley's Decision Angers Whites, Minorities Alike

Chicago Sun-Times

January 27, 1996. SATURDAY, Late Sports Final Edition

SECTION: NEWS; Pg. 1

LENGTH: 715 words

HEADLINE: Fire, Police Exams Leave Racial Divide; Daley's Decision Angers Whites, Minorities Alike

BYLINE: BY FRAN SPIELMAN

BODY:

Mayor Daley on Friday attempted to walk a political tightrope on an issue that has dogged Chicago mayors for decades -- hiring and promotions in the police and fire departments -- and ended up pleasing no one.

Blacks and Hispanics were livid that police promotions will be based strictly on the order of exam scores, and whites were angry that Fire Department hirings will not be.

Six months after a record 26,000 applicants showed up at the United Center to take the first firefighters entrance exam in 10 years, Daley announced that the top 1,782 scorers will be lumped into the same "well-qualified" pool. Instead of hiring in order of the test score, the city will put those names in a hat and pick at random.

The decision stems from what city officials called the "disappointing" performance of minorities. Of

candidates with scores of 89 and above, 75.8 percent are white, 11.5 percent are African American and 9.9 percent are Hispanic. In all, 92.6 percent are men.

Of the 26,052 firefighter candidates who took the exam, 44.7 percent were white, 36.4 percent were black and 15.6 percent were Hispanic. Eighty-three percent were men.

Six hundred firefighters will be hired from the "well-qualified" pool over the next three years. The list will not be taken down until all 1,782 names are called.

Daley also announced plans to make 350 promotions in order of rank in the Police Department, then scrap the methods that produced the next generation of lieutenants and sergeants. They will be replaced by soon-to-be-developed "alternatives to promoting strictly by written examination."

Of the 296 new sergeants, 85 percent are white, 9 percent are black and 4 percent are Hispanic. Twenty-six percent are women. The 54 new lieutenants are 94 percent white, 4 percent black, 2 percent Hispanic and 24 percent female.

The mayor said he would create two task forces to explore ways to enhance "professionalism and diversity" in the Police and Fire departments. The panel of experts is expected to develop a hybrid testing system that combines written and oral exams with such factors as seniority, performance and "leadership qualities." Merit promotions also may be used.

"It is my strong belief that a government must be reflective of the people it serves. . . . It is increasingly clear to me that written tests alone are not the best

criteria for achieving a qualified and diverse work force," Daley said in a news release.

Last month, the Illinois Appellate Court struck down Daley's pre-election decision to make 13 merit promotions to police lieutenant -- without regard to test scores -- to ensure racial balance.

Daley had vowed to take the case to the Illinois Supreme Court, but on Friday the city decided not to appeal.

Daley was unavailable for comment, having left a Washington, D.C., news conference where he was supposed to be a featured speaker. But Corporation Counsel Susan Sher defended the mayor's decisions on the fire and police exams.

Sher said scores of the top 1,782 firefighter candidates are "statistically insignificant," and there was "no evidence" that the police promotion exams were unfair.

But whites and minorities who have complained over the years about hiring and promotions in the police and fire departments were dissatisfied.

"They didn't ask what color we were when they got on those ladders on Cottage Grove," said Dan Fabrizio, president of Chicago Firefighters Union Local 2, referring to last week's deadly fire at a South Side high-rise.

"Everything was created equally for the exams, and we believe you should let the chips fall where they may in rank order."

Ald. Robert Shaw (9th), who is black, said the police promotions, which minorities contend are cul-

turally biased, "lock (303) whites into positions that will take us into the year 2020. Those will be the future bosses of the Police Department."

Ald. Ricardo Munoz (22nd) said he was "appalled" that only one Latino would be promoted to the rank of lieutenant.

"Something's got to get done to ensure that the police force reflects the makeup of Chicago. I'm not just talking about your beat officer. I'm talking about the sergeants, lieutenants -- those who make key decisions on the deployment of personnel in our communities," Munoz said.

GRAPHIC: CHARTS; see microfilm.

LOAD-DATE: January 29, 1996

Job Exams Baffle City Again; Police-Fire Diversity Still Difficult Goal

Chicago Sun-Times

January 28, 1996, SUNDAY, Late Sports Final Edition

SECTION: SUNDAY NEWS; Pg. 10

LENGTH: 1083 words

HEADLINE: Job Exams Baffle City Again; Police-Fire Diversity Still Difficult Goal

SOURCE: ROBERT A. DAVIS

BYLINE: BY FRAN SPIELMAN AND TIM NOVAK

BODY:

In 1993, Mayor Daley spent $ 5.1 million to lift -- once and for all -- the cloud that hung for decades over hiring and promotions in the police and fire departments.

Responsibility for administering tests would be stripped from politicians and bureaucrats and placed in the hands of testing professionals. They would devise fair and impartial exams that neither whites nor minorities could criticize.

So much for good intentions.

On Friday, Daley acknowledged that his grand testing experiment had failed to produce a diversified police and fire workforce.

He announced that firefighters will be hired at random from top scorers on an exam, rather than in order of test score. Police promotions, on the other hand, will be based on the order of exam scores.

And, for the second time since he took office nearly seven years ago, the mayor said he will ask experts to take another crack at solving the testing puzzle.

The panel is expected to develop a hybrid system that combines written and oral exams with such factors as seniority, performance and "leadership qualities." Merit promotions -- a tactic Daley tried and failed to use with police lieutenants -- also may be included.

The mayor's decision stems from what he called the "disappointing" performance of minorities on the first firefighters entrance exam in 10 years and on similar results in the police sergeants and lieutenants exams. More than half those tested for firefighters' jobs were minorities, but nearly 76 percent of those deemed well-qualified by the tests were whites, officials said Friday.

"It is my strong belief that a government must be reflective of the people. . . . It is increasingly clear to me that written tests alone are not the best criteria for achieving a qualified and diverse workforce," Daley said.

The decision to pull the plug exasperated aldermen, who were never too keen on hiring outside testmakers.

"After we spent an absolute fortune trying to get as fair a test as possible, time after time we get the same results," said Ald. Bernard Stone (50th). "Are you going to tell me that each and every test is not culturally acclimated to our population? I don't know. Maybe it's the result of a bad public school system."

Ald. Dorothy Tillman (3rd) insists the tests are "culturally biased." That's an allegation that black and Hispanic aldermen made loudly in 1994 after a sergeants exam left minorities with just five of 114 promotions.

"We're not that dumb and that stupid," Tillman said.

Before 1993, the city's Department of Personnel drafted and administered police and fire exams. The results were criticized by whites and minorities alike.

The long-simmering controversy came to a boil in August, 1992, when 133 answer sheets from a fire lieutenants exam disappeared. After an internal investigation, the test was administered again at a cost of millions.

Corporation Counsel Susan Sher said the $ 5.1 million for outside testing services was well-spent. If anything, consultants may have gone too far, she said.

"The reason for going with all of these written exams is the city was being criticized in the past for being subjective and for using political favoritism," Sher said. "I think it's clear we've gotten away from that. But we've gotten so far away from it, we're substituting what we call objectivity. In truth, we're just not capturing enough of what makes a true leader."

Fraternal Order of Police President Bill Nolan recalled those "good old days when people had a chance to fool around" with hiring and promotion lists.

"Years ago, people used to tell me exactly where they were going to land on the list before the list was posted," Nolan said. "They had the right information and the right (political) sponsor. The list came out and, sure enough, they were right on the money or maybe one or two off."

Former Police Superintendent LeRoy Martin said job performance should be the main criterion for promotions.

"The Police Department needs to take a good look at the total individual, and they haven't been doing that," he said. "It's basically all just written tests. . . . If you study well, but have only limited experience, you can be promoted."

Martin, now police chief for the Illinois Department of Central Management Services, said racial diversity is essential.

"Racial groups live in enclaves," he said. "Policing various neighborhoods becomes a cultural item as well as a racial item . . . In community policing, you've got to interact with the residents."

Martin's suggestions were incorporated in the recommendations Daley received the last time he appointed one of those blue-ribbon testing committees, said Dr. Bernard Gifford, who served as chairman. The suggestions were never implemented, in part because of "legal impediments," he said.

"Human beings are far too complex to be evaluated by their performance on a pen and paper exam taken over a four-hour period," he said. "The recommendation from the committee was that you not se-

lect or reject individuals based solely on the examination."

But union leaders are skeptical.

"Are they talking seniority, oral exams, efficiency marks? We don't have a clue," said Dan Fabrizio, president of Chicago Firefighters Union Local 2.

"You could have a pass-fail exam and go with seniority. That may work. But when you get into orals and merit, what's the criteria going to be? It's too open. It's too subjective. We'll be right back where we started from."

During the 1970s, the city agreed to award back pay and retroactive seniority to more than 700 plaintiffs who had accused the Police Department of discriminating in hiring and promotions.

A 20-year consent decree governing Fire Department hiring was lifted last summer. The decree governing fire promotions remains in effect.

But Sher said court decisions have made diversification more difficult. In 1991, Congress passed a Civil Rights Act that outlawed "race norming," the practice of adjusting minority test scores upward. And last month, the Illinois Appellate Court struck down Daley's pre-election decision to make 13 merit promotions to police lieutenant -- regardless of test scores -- to ensure racial balance.

Sher said Dr. James Outtz, the African-American consultant who developed the firefighters exam, believed the video component of the exam would "limit the adverse impact" on minorities. It didn't.

"This is very difficult," she said. "We're trying to be fair."

GRAPHIC: Firefighting applicants take the exam at the United Center last summer. More than half of the 26,000 candidates were minorities. But of those who scored 89 or above, 75 percent were white.; SEE Related Chart

LOAD-DATE: January 29, 1996

Mayor Defends Hiring, Promotion Decisions on Police and Firefighters

Chicago Sun-Times

January 31, 1996, WEDNESDAY, Late Sports Final Edition

SECTION: NEWS; Pg. 16

LENGTH: 367 words

HEADLINE: Mayor Defends Hiring, Promotion Decisions on Police and Firefighters

BYLINE: BY FRAN SPIELMAN

BODY:

Mayor Daley on Tuesday defended his contradictory decision to make police promotions in rank order and hold a lottery for firefighters, arguing that the next generation of police and fire leaders cannot be all white.

"We need diversity in the work force in this city. You cannot have an all black, all white, all Hispanic, all male or all female" work force, he said.

Asked whether the new hiring and promotion policies would withstand a court challenge, Daley said, "We don't have any assurance. But, one thing we know is you need diversity in the management and operations of any private company or public company. It doesn't matter what it is."

Last week, Daley infuriated both blacks and whites with decisions on the thorny issue of promotions and hiring in the Police and Fire departments.

After minority candidates fared poorly on the firefighters entrance exam, the mayor decided to

lump the 1,782 top scorers into a "well qualified" pool and randomly select 600 candidates to be hired.

In an apparent attempt to appease whites, the mayor said 350 promotions to police sergeant and lieutenant would be made in rank order from test scores.

The exams would then be scrapped for a hybrid system that combines written and oral exams with such factors as seniority, performance and "leadership qualities."

Daley said he was "extremely disappointed" that taxpayers spent $ 5.1 million to have consultants develop unbiased exams, only to have minorities fare poorly again.

But, he said, "You just cannot give up. You have to keep moving forward at it -- look at it and then come up with other recommendations."

The mayor said the lottery for firefighters is nothing new. The city did the same thing after police entrance exams in 1991 and 1994.

"It's been accepted. It's a good practice. This is not new ground. We're talking about entry exams. That's completely different," he said.

Daley said police promotional exams will be held more frequently.

"What we've seen in the past is that once you did enter a promotional exam and failed, you would never be able to take it again. That was one of the major problems over the years in both fire and police," he said.

LOAD-DATE: January 31, 1996

Fire Department Wants To Use Old Hiring List; Force Short 200; Overtime Soars

Chicago Sun-Times

February 1, 1996, THURSDAY, Late Sports Final Edition

SECTION: NEWS; Pg. 11

LENGTH: 406 words

HEADLINE: Fire Department Wants To Use Old Hiring List; Force Short 200; Overtime Soars

BYLINE: BY FRAN SPIELMAN

BODY:

The Chicago Fire Department made a pitch Wednesday to hire 200 firefighters from an abandoned hiring list to reduce overtime costs that soared $ 1.5 million over budget last year.

The hiring plan was disclosed as the city planned to pay $ 7,500 more for a random ranking of new firefighters -- on top of the $ 5.1 million already spent for police and fire exams that Mayor Daley plans to scrap.

In asking to be allowed to hire from the old list, fire officials said the background checks, physical agility tests and medical exams required before new recruits can enter the fire academy would take four months to complete.

Candidates on the old list, however, already have gone through the procedure.

Without immediate hirings, the Fire Department will continue to rack up excessive overtime because

there are 200 vacancies and a monthly attrition rate of 16.

In 1995, the Fire Department spent about $ 9.5 million on overtime -- 18.7 percent over budget.

Adrianne Bryant, an assistant to the mayor, said another round of hiring from the 1985 list is not likely. "The list is 10 years old. In very short order, we're going to have a new list to hire," Bryant said.

Ald. Thomas Murphy (18th), whose ward is home to many firefighters, said he would not support another round of hiring from a "stale list."

"If they were so concerned about overtime, they should have cross-trained paramedics (as firefighters) years ago. What they should do now is move expeditiously to hire off the new list," Murphy said.

The previously undisclosed fee for the accounting firm Arthur Andersen are the result of a 1993 contract that did not include "randomizing" entry-level scores for Chicago firefighters.

Last week, Daley decided to lump the top 1,782 scorers into the same "well qualified" pool following what he called the "disappointing" performance of minority candidates.

Instead of being hired in order based on test scores, names from the new list will be chosen at random. Six hundred firefighters will be hired from the "well qualified" pool over the next three years. The list will used until the names on it are exhausted.

Bryant said Daley's directive requires use of a "randomization" computer program capable of sorting the firefighters list by computer.

The city can't just put the 1,782 names in a barrel and pick them out one at a time, she said, because old allegations of favoritism would be renewed.

LOAD-DATE: February 1, 1996

Minorities Hot Over Fire Test; Protest Latest Exam, May Set Up Union

Chicago Sun-Times

February 4, 1996, SUNDAY, Late Sports Final Edition

SECTION: SUNDAY NEWS; Pg. 6

LENGTH: 377 words

HEADLINE: Minorities Hot Over Fire Test; Protest Latest Exam, May Set Up Union

SOURCE: ANDRE F. CHUNG

BYLINE: BY MAUDLYNE IHEJIRIKA

BODY:

In his 16 years with the Fire Department, Curtis Powell, captain of engine 103, has taken exams to be promoted to engineer, lieutenant and captain.

But Powell wouldn't be a firefighter today, based on the score he got when, on a whim, he joined 26,000 applicants taking last summer's entrance exam.

On Saturday, Powell joined about 150 African-American and Latino firefighters and recent applicants to protest the low numbers of minorities in the pool of applicants who scored well on an August firefighter exam.

The 80 minority firefighters at the protest also slammed the firefighters union. They said a lack of minority representation in union leadership has resulted in poor representation on their behalf on the exam issue and has divided the ranks.

"I was in the top group of applicants when I took the first exam and got on the force in 1978," Powell said. "I took the new test just to see what it was like. It was a guessing game."

Flanked by the firefighters and would-be firefighters at a news conference at his South Side church, the Rev. Tyrone Crider, a former PUSH executive director, demanded a meeting with the mayor, threatening marches and demonstrations to achieve the goal of more minorities on the Fire Department.

"Today, we're standing strong. We come together, because we believe that in the city of Chicago, the fire strike that ended in 1980 resulted in Appendix G -- a call for hiring 37 percent African Americans on the force," Crider said. "We will march and do whatever we have to do until we get fairness and justice from the city and the Chicago Fire Department."

After minority candidates fared poorly on the first entrance exam in 10 years, Mayor Daley decided to lump the 1,782 top scorers into a "well qualified" pool and randomly select 600 candidates to be hired. Of candidates with scores of 89 and above, 75.8 percent are white, 11.5 percent are African American and 9.9 percent are Hispanic.

Mayoral spokeswoman Noelle Gaffney said on Saturday that two task forces the mayor will appoint to explore ways to enhance "professionalism and diversity" in the Fire and Police departments would have to meet with the group.

Representatives of the group said they might attempt to form their own union.

GRAPHIC: Curtis Powell, captain of engine 103, said his score on the recent firefighters test wouldn't get him a job today. He called the test a guessing game.

LOAD-DATE: February 5, 1996

Halt Police, Fire Plans, Daley Told; Minorities: Hirings, Promotions Unfair

Chicago Sun-Times

February 8, 1996, THURSDAY, Late Sports Final Edition

SECTION: NEWS; Pg. 56

LENGTH: 398 words

HEADLINE: Halt Police, Fire Plans, Daley Told;

Minorities: Hirings, Promotions Unfair

BYLINE: BY MAUDLYNE IHEJIRIKA

BODY:

More than 2,000 African-American and Latino police officers and firefighters plan to march on City Hall next week to protest the low number of minorities among candidates to be hired and promoted, the Rev. Jesse Jackson said Wednesday.

Speaking after he met with 200 police officers and firefighters, including some who recently took the firefighters exam, Jackson urged Mayor Daley to discard plans to hire firefighters and promote police lieutenants and sergeants from pools holding few minorities. Standing with representatives of African-American and Latino police and firefighter associations, Jackson said the mayor must act on his comment that "government must be reflective of the people it serves."

The mayor should appeal a court ruling banning a police promotions system that ensured diversity, Jackson and the group said. They characterized as "unfair" Daley's plan to hire firefighters from a pool

of 1,782 candidates deemed "well qualified," while promoting police lieutenants and sergeants in rank order.

"Mayor Daley has expressed disappointment over the tests and the results. Now he should stop the promotion process," Jackson said.

Mayoral spokeswoman Noelle Gaffney said the mayor is proceeding as planned.

Daley last week announced plans to hire randomly from a pool of candidates scoring above 89 on the firefighters entrance exam. The pool is 76 percent white, 11 percent African-American and 10 percent Hispanic.

Daley also announced plans to make 350 rank order police promotions, then scrap the lieutenants and sergeants lists in favor of soon-to-be developed "alternatives to promoting strictly by written examination."

Of 296 new sergeants, 85 percent are white, 9 percent African-American and 4 percent Hispanic. Of 54 new lieutenants, 94 percent are white, 3 percent African-American and 1 percent Hispanic.

"We're saying if the numbers were flipped, if out of 296 sergeants only 28 were white, everyone would say, 'Stop. Something isn't fair here,' " said Sgt. Vance Kimber, president of the Guardians Association, a police group.

Gaffney defended Daley's solution to poor test results among minority applicants.

"Mayor Daley was also disappointed in the results of the exam, but believes it was a fair exam,"

Gaffney said. "In fairness to all those who took the tests, he feels it's appropriate to go forward with the hiring."

LOAD-DATE: February 8, 1996

CHICAGO TRIBUNE

February 4, 1996

Section: METRO CHICAGO

BLACK FIREFIGHTERS BLAST CITY EXAMS

THEY WANT MORATORIUM ON HIRING UNTIL LATEST RESULTS INVESTIGATED

Sabrina L. Miller, Tribune Staff Writer.

Advance copies of the city firefighter exam are given to "certain people," the scores for minority applicants are tampered with and the test is culturally biased to favor whites, a group of black firefighters and applicants charged Saturday.

And there should be a moratorium on hirings from the most recent entrance exam until all of those issues are addressed by federal and local investigations, the group said at a news conference at New Hope Community Baptist Church on the South Side.

But Jim Williams, a spokesman for Mayor Richard Daley, said Saturday that although city officials are disappointed by the test scores of minority applicants, hiring will go on.

"We understand their frustration and we share it," Williams said. "We have made a good-faith effort to have a diversified fire department."

The group, representing ministers from the Pastor's Network, current and retired black firefighters and applicants and a few Latino firefighters, said it was responding to the most recent performance of minority applicants on the firefighter entrance exam.

Of the 26,000 men and women who took the exam in July, 1,782 were scored "well-qualified." Of those considered "well-qualified," only 11.5 percent were African-American. The city has decided to select from that pool at random, rather than fill 600 open firefighter slots with the top 600 applicants.

At least 100 people came to the church, 4720 S. Cottage Grove Ave., to protest what they believe are unfair hiring practices and exams that systematically disfavor minorities.

Charles Gamble, 67, a retired fire captain and 28-year veteran of the fire department, said black firefighters should no longer be subjected to the discriminatory procedures that he and his black colleagues faced when he first became a firefighter.

"But then again, this is Chicago, and I ain't never seen a fair test yet in this city," Gamble said.

"We request that no hirings be done based on those results," said Rev. Tyrone Crider, president of the Pastor's Network, a group of Chicago ministers. "The entire exam should be considered null and void."

The city spent $5 million for a consultant, who is an African-American, to develop objective tests. Daley appointed a blue-ribbon panel to deal with the issue and had the consultant head the panel.

"We have gone to great lengths to come up with a fair test," Williams said.

Still, Daley is convening two panels to look at qualifying exams for the city's police and fire departments in the near future.

Distrust among current and retired firefighters about the testing process was high.

They asked why it took six months to receive the test results, and they remain convinced that high-ranking fire officials are passing along copies of the test to their friends and relatives.

Williams refuted those charges, saying the firefighters couldn't prove improper behavior by fire officials. He said it takes six months to get test scores because 26,000 people took the exam.

"I can assure you there is no tampering with this exam," Williams said.

The firefighters and Crider are heading up a petition drive asking for a moratorium on hiring and for new hiring procedures to be implemented.

They said they want congressional and City Council hearings on the issue.

They also want meetings with Daley, Fire Chief Raymond Orozco and aldermen until the issue is resolved.

"There has to be some kind of way to make the test more fair. With it taking six months to get the results, there's no telling what is being done with the answers," said Lt. Stanford Murry, a 26-year fire department veteran.

"If the results were given back immediately and (African-Americans) still didn't score well, then we wouldn't have anything to say," Murry said. "But as it stands, I know there is tampering going on."

Michael Danzy, a 19-year veteran, agreed, saying, "This is not a new issue. We've been trying to get this addressed ever since I've been a fireman.

"Every time one of us opens up our mouths, we get harassed. There is no question that the system needs to be completely revamped."

Williams said the process for hiring firefighters is a complicated one, and that even the "well-qualified" applicants aren't guaranteed a job.

"They are still subjected to background checks and a host of other criteria before they are hired," he said.

The African-American firefighters and other concerned residents who came to the news conference also said they wanted a full-scale investigation of the deadly fire at the high-rise at 3555 S. Cottage Grove Ave. in which four people died two weeks ago.

They are alleging that some standard operating procedures weren't followed and that lives might have been saved if they had.

The group also said it wants more minority and female representation in one of the local firefighter unions, and that they are considering starting a separate union if the issue is not addressed.

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CHICAGO TRIBUNE

March 4, 1996

Section: METRO CHICAGO

ATLANTA FIRE, POLICE EXAMS WIN PLAUDITS

CITY'S TEST PROCESS VIEWED AS UNBIASED

Terry Wilson, Tribune Staff Writer.

With minorities consistently scoring poorly on the tests and the testing process itself shrouded in mystery, fire and police exams in Chicago have a predictable result: controversy, lawsuits and handwringing.

The problems faced in Chicago are the same ones found in many other large cities. But it isn't always that way.

In Atlanta--one of a handful of cities trying innovative ways to create a diverse work force of firefighters and police officers--the lawsuits have stopped flowing.

When Atlantans take the police and fire promotional exams there, they prepare by taking a study program developed by the same consultant who made up the test.

After they take the test, they get an opportunity to see what questions they got wrong and what the correct answers are.

These practices have improved results and eased tensions.

In recent firefighters' promotional exams for the rank of lieutenant, 62 percent (47 out of 76) of white firefighters passed and 41 percent (75 out of 182) of

black firefighters passed. One Hispanic firefighter took the test and passed.

The contrast with fire and police exams in Chicago is notable.

Last July's entrance exam for firefighters here again created an uproar--despite an expensive effort by the city.

Chicago officials had hoped the results would be better after they spent $5 million, hired an African-American consultant, James Outtz, and set up a blue-ribbon panel. But the firefighter results were disastrous. Rather than take the top 600 scorers to fill the 600 openings, City Hall decided to choose from among the larger pool of well-qualified candidates.

On Friday, minority police officers suffered a court setback when a federal judge, citing public-safety concerns, refused to temporarily block the City of Chicago from making further promotions from a controversial police lieutenants test list.

By rejecting a request for a preliminary injunction, U.S. District Judge Robert Gettleman cleared the way for 18 sergeants undergoing training in the Chicago Police Academy to be promoted in a week or two, city lawyers said.

In Atlanta, change can be traced to a 1992 city ordinance that set the guidelines for the testing process for police sergeants and lieutenants and fire lieutenants and captains. Then the city hired Jerry Solamon, an industrial psychologist, to assess what skills, abilities and knowledge candidates for those jobs need to possess.

Solamon used the job description information to devise new tests. He said his work earned him a great compliment: An attorney for the City of Atlanta told him she no longer had to devote six months of work to litigation filed by employees contesting unfair tests.

"Everyone knows the rules up front," Solamon said. "We develop the test and I also develop the tutorial program. Who better to have a tutorial from than the test maker?"

"It's doing just fine," said Nick Gold, spokesman for Atlanta Mayor Bill Campbell. "We're real pleased."

In Chicago, the tests are guarded like cash in a Brink's truck, but Solamon is happy to recite a few of the questions.

He also kept the wording of the test at a high school level and included African-American officers among the subject-matter experts who helped him frame questions for the test.

"The ordinance says what we do," Solamon said. "All I did was try and make it understandable."

Those who take the test can review it afterward, comparing their answers along with the correct answers and the source material from which the question was drawn, he said.

In cities besides Atlanta, officials are questioning the validity of written tests as a measure of performance and potential--and adjusting their exam procedures to try to better gauge skills.

The Los Angeles Police Department, which operates under a consent decree to increase blacks and Hispanics among its ranks, has changed the weighting of its promotional tests from a half-and-half mix of written and oral to 70 percent oral and 30 percent written because minorities tend to score lower on written portions.

Minneapolis has taken seniority out of its promotional process and has moved to an "in-basket" type of test for its lieutenants and captains, a test that demonstrates problem-solving ability and an ability to prioritize.

In Chicago, as in some other cities, politicians have charged that the tests are racially biased. But no specific examples of just how they are biased usually are given.

People who consult on such tests say that there are ways that questions can be worded that hurt the chances of minority applicants.

Harold E. Dent, a testing consultant from Hampton University in Virginia, said test designers who phrase a question with a double-negative or using homonyms--words that sound the same but mean different things--reduce the odds that minorities will score well. He says that using complex sentence structures toward the end of an exam and asking questions that reflect the middle-class experiences of whites have had similar consequences.

Robert Schaeffer, public education director for FairTest, of Cambridge, Mass., said his firm obtained a copy of a Washington, D.C., police promotional test that included the question: "What does RSVP mean?"

The question, which may be important to diplomats, was not something that factored heavily into police work, he said.

In Chicago, some theorize that applicants who attended the city's notoriously poor public schools, which are populated primarily by minorities, are at a disadvantage in test-taking.

Another possible factor is that some police officers who have taken promotional exams say they tend to study in racially separate groups headed by officers who have passed the test because they feel more comfortable than they would mixing with other officers. The officers who head the courses are not trained instructors.

All officers in Atlanta who take study courses for tests study under Solamon, who works for the personnel department. He said many times, minorities score higher on tests than whites.

"It takes the mystery out of the (testing) program here, and that sells your program to your (job) candidates," Solamon said. "If you treat people fairly and you give them as much as you can give them, they will respect the system."

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Fire exam flap heats up

Chicago Defender

Monday, February 5, 1996

By Chinta Strausberg

African American firefighters are calling for sweeping changes in their union and department, buttressing their demand by launching a "freedom fund" to bolt the mostly white guild.

Wanting to control their nearly $500,000 in union dues, the Black firemen say they want to create jobs and use their money to fight for affirmative action.

They have called for a hiring freeze and are seeking the voiding of a recent entrance exam they say was "culturally biased."

In launching their "freedom fund" to form a Black union, the firefighters have taken up collections to begin an escrow account.

At a press conference held at the New Hope Baptist Church over the weekend the firemen began circulating a protest petition.

Curtis Powell, 39, strongly objected to the video portion of the exam. He likened it to a TV show having three doors of opportunity. "What's behind door number one? Is it a car, true or false?"

In the department or 16 years, Powell, a fire captain in Engine Co. 103, likened the entrance exam to a lottery. "It was like a guessing game," he said.

Kublai K.M. Toure, 47, an eight-year fireman on medical leave, said breaking from the Chicago Firefighters Union Local 2 makes a lot of sense and that

to continue paying dues into their union "is taxation without representation."

"It doesn't make sense for me to give you money for you to use my money against me," Toure said. He and others want to use the nearly $500,000 in dues "for our own cause. The union is using the money we give them to fight against us. How long will we continue to be a fool?"

Move afoot to scrap fire exams

Chicago Defender

Tuesday, February 6, 1996

By Chinta Strausberg

A number of aldermen, including Finance Chairman Ald. Edward M. Burke (14), Monday agreed it's time to throw out current fire exams and find alternative hiring guidelines that include academic degrees or perhaps agility tests rather than written tests Blacks claim are culturally biased.

"We've spent $6 million so far on experts trying to come to a conclusion that everybody agrees with, that it hasn't worked." Burke told reporters, "I do think that requiring a high-level of educational accreditation would be a good start – college degrees for most of these positions."

Asked if there should be written tests, Burke said, "That's OK for promotional exams, but there has to be some kind of testing or analysis."

He said testing for promotions "doesn't seem to be working and is costing a lot of money." Burke added that the city should mirror the private sector that hires and promotes in a way "that produces a diverse workforce."

But while the mayor said he's not happy with the small percentage of minorities passing the exams, he defended giving fire and police entry tests.

"You can't all of a sudden tell people overnight that you need a Master's (degree) to be a reporter," Daley said, comparing it to Burke's suggestion to

promote according to degrees. "The only way you can do it (promoting) is by giving entrance exams."

Daley said the city can't change rules in the middle of the stream and that there can never be a throwback of injecting politics into promotions via political decisions.

"The federal government demands exams," he said.

Alds. John Steele (6) and Barbara Holt (5) agreed with Burke that with the city spending more than $5 million to develop police and fire exams that produced minimal numbers of minorities, more testing is not the way to go.

"I think that we're trying to reinvent the wheel," Steele said. "How does the U.S. military promote people? I don't believe they give tests beyond entry exams. I don't know the relevancy of a test unless it's a determining factor if you can do a job."

"The question is when you have merit selection whether the people doing the promoting are doing it in a meritorious manner but no matter how you test, if it's not fair, it's always going to be an issue," Steele said.

"I don't know if testing has to be involved beyond the entry level. As far as I'm concerned the whole test can be thrown out. There are other ways to make promotions that are fair and equitable that needs to be looked at."

A former teacher, Holt said, "Performance-based assessment" could be one alternative. "Paper and pen tests do not effectively measure what needs to be

measured to determine a young or older person's progress or mastery in a particular area."

Standardized vehicles, she said "have serious shortcomings in this society. There are alternatives to determine a person's capacity to perform effectively than using standardized tests" which she labels a "tremendous profit-making industry."

"A degree is often an indicator to one's access to resources rather than one's capacity to do a good job," Holt added. "We're in a society where there are historic barriers to advancement to certain categories – African Americans, Latinos, women."

Jackson seeks to halt 'unfair' cop promotions

Chicago Defender

Wednesday, February 7, 1996

By Chinta Strausberg

The Rev. Jesse L. Jackson said Tuesday he's joining a federal lawsuit to halt current police and fire promotional exams until a fairer procedure is found to ensure greater racial diversity in the departments.

Jackson, who is holding a press conference today with police, firemen and ministers at Operation PUSH, said PUSH and the National Rainbow are joining a lawsuit as a friend of the court.

In support of more than 150 Black officers and sergeants representing the "1996 Committee for Fair Treatment," Jackson said: "The using of these test scores solely is unfair and inadequate. There must be some combination of test scores with verbal (and) practical (determinates)."

Jackson said the police and fire departments must mirror the city's population, which is more than 60 percent African American and Latino.

A current dispute centers around recent police and fire exams that resulted in the promotion of 296 mostly white sergeants and up to 54 lieutenants.

African American elected officials are also irate over the upcoming promotions of 252 white, 28 African American, 12 Latino, and four "other" officers. Some 76 women will be promoted to sergeant, along with 51 white lieutenants, two African Americans and one Latino officer.

Until there is a consensus on how to promote, Ald. Edward M. Burke (14) suggested using academic degrees as a litmus test, an idea Ald. William Beavers (7), chairman of the city's police and fire committee, Patricia Hill, president of the African American Police League (AAPL), Fraternal Order of Police President Bill Nolan and Mayor Daley scoff at.

Interviewed at police headquarters, Daley was asked Tuesday if using academic degrees to promote is the answer.

"We have federal laws," Daley said, noting that they mandate that there must be written tests.

Nolan who admits he doesn't have an answer to the quandary, is holding a summit meeting at 9:30 a.m., Feb. 16th at the Quality Inn Hotel where the heads of various African American, white, Latino and Asian law enforcement agencies will try to resolve the exam debate that is reportedly racially dividing the two departments.

Nolan turned thumbs down on Burke's idea of promoting based on academic degrees.

"If I had a Ph.D., do you think I'd be on the police force? What you need is a lot of street smarts. You have to have a test. What do you do if you can't read?" asked Nolan.

Saying obtaining higher academic degrees is "great," he added, "I only hope they're street-smart, have common sense. Do we want all professors on the job? It's nice to have that education, but you also have to have the education of the street which comes from hands-on experience."

Beavers agreed and said he's studying the issue in search for viable alternatives to current police and fire exams.

Due to the paucity of minorities passing recent police and fire exams, the mayor is appointing two task forces to review alternative promoting strategies and is vowing to fine-tune his testing procedures.

"If the mayor objects to the tests and the outcome, he should not proceed on them until our appeal has been heard," Jackson said, referring to Daley's "disappointment" in the exam results.

For her part, Hill, who said she wasn't aware of Nolan's upcoming ethnic summit, wants promotions frozen for now as she calls for an investigation "into 800 missing exams" from the last testing session.

Angry firemen target City Hall

Chicago Defender

Thursday, February 8, 1996

By Chinta Strausberg

Charles Vazquez, president of the Latino Firefighter's Association, Wednesday joined Operation PUSH in calling for a march around City Hall to protest the paucity of minorities on the police and fire departments.

He's waiting for "pass/fail" methodology rather than on scores. He said that in the past, anyone receiving a grade of 70 or above, "were in, but now anyone receiving 89 or below are out." He said there are 350 Hispanic firemen and paramedics out of more than 5,000 personnel. Vazquez called that "totally unacceptable."

Vazquez joined the Rev. Jesse Jackson who held a press conference at Operation PUSH where more than 200 police and firemen joined him in solidarity.

"These firefighters and police in the best tradition of Dr. Martin Luther King Jr. are choosing to walk in dignity than hide in shame," Jackson said.

Jackson said he hopes to meet with the fire union leaders and Mayor Daley but their demand for greater minority participation on the police and fire departments will be escalated to a major protest on City Hall.

PUSH and the Rainbow Coalition are going to join the court suits as friends of the court.

"But beyond litigation, we're calling for mass education and mass demonstration," he said. Jack-

son announced there will be a protest march from PUSH on City Hall "and educate people in the process, people who want to work. We're not fighting for welfare. We're fighting for fair share.

Parents need jobs and children need schools and that's the alternative to welfare and jail," Jackson said.

Annette Nance-Holt, an African American female firefighter, said they are not excluding whites but wonder why no more than just a few minorities manage to get on the fire department and pass the exam even though many are college graduates.

Of the scores, Nance-Holt said, "I'm a college grad. How is it all these college grads couldn't even score qualified? Is the fire department that difficult to get on? But, yet you have all of these others who took the test and they get well-qualified and they've never had any experience, any training or anything."

"We refuse to accept this because it's not believable, not acceptable to any of us," she said. "We are not ignorant people, and we should not be projected in that manner," she told cheering firemen and policemen.

Lt. Al McCormick, a firemen since 1980, talked about "economic discrimination." Referring to the fire department's budget, McCormick said minorities "have an equal right to experience the economic benefits of jobs and city services."

He said they have to be well qualified to get into the fire department.

"The precedent in the past was that we were not qualified – that all you had to be was white and

qualified. But now all of a sudden we have to be well-qualified to get on the job," McCormick said. "We had a test that out of 27,000 people taking it one in every 8.6 whites who took the examination landed well-qualified."

"One in every 24 Hispanics who took the examination landed well-qualified, but one in 61 Blacks who took this examination ended up well qualified." McCormick said. "When the net effect is racially bias, we will not stand for that."

He wants the city to realize that "they are not a private industry ...realize they have a responsibility to, by and of the people. We want our fair share of jobs, results of hiring and promotions in the fire department."

PETITIONER'S BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ARTHUR L. LEWIS, JR., *et al.*,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

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QUESTION PRESENTED

Under Title VII, a plaintiff seeking to bring suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice occurred. Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the announcement of the practice, or may a plaintiff file a charge within 300 days after the employer's use of the discriminatory practice?

PARTIES TO THE PROCEEDINGS

The petitioners are Arthur L. Lewis, Jr., Gregory S. Foster, Jr., Arthur C. Charleston III, Pamela B. Adams, William R. Muzzall, Philippe H. Victor, Crawford M. Smith, and Aldron R. Reed, on behalf of a class of approximately 6,000 unsuccessful applicants for entry-level Chicago firefighter jobs, along with the African American Fire Fighters League of Chicago, Inc., all of whom were plaintiffs and appellees in the courts below. The African American Fire Fighters League of Chicago, Inc. is a not-for-profit corporation which has not issued stock and has no corporate parent.

The respondent is the City of Chicago, which was the defendant and appellant in the courts below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing the judgment of the district court, is reported at 528 F.3d 488 (7th Cir. 2008), and is reproduced at Pet. App. 1a-11a. The opinion of the United States District Court for the Northern District of Illinois, finding liability under Title VII against respondent City of Chicago, is unreported and is reproduced at Pet. App. 12a-43a. The opinion of the district court finding that petitioners' EEOC charges were timely is unreported and is reproduced at Pet. App. 44a-70a.

JURISDICTION

The court of appeals entered its judgment on June 4, 2008. Petitioners filed a timely petition for rehearing *en banc*, which the court of appeals denied on August 21, 2008. Pet. App. 71a. On November 5, 2008, this Court extended the time for filing a petition for a writ of certiorari by sixty days. Order on Application No. 08A404. Petitioners filed a timely petition for certiorari. S. Ct. R. 30.1. This Court granted certiorari on September 30, 2009, and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

> (a) It shall be an unlawful employment practice for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Section 703(k)(1)(A) of Title VII, 42 U.S.C. § 2000e-2(k)(1)(A), provides:

> (k) Burden of proof in disparate impact cases
>
> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job re-

> lated for the position in question and consistent with business necessity.

Section 706(e)(1) of Title VII, 42 U.S.C. § 2000e-5(e)(1), provides in pertinent part: "A charge under this section shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred."

STATEMENT OF THE CASE

On eleven separate occasions from 1996 to 2002, the City of Chicago hired firefighter candidates—more than a thousand in total—based on the results of its 1995 entry-level firefighter test. Although all applicants who scored 65 or higher passed the test and were fully qualified to perform as firefighters, the City hired only those applicants who scored 89 or above for ten full classes of firefighter candidates, and a portion of an eleventh class, during this period. There was never any dispute that the City's practice of hiring only applicants who scored 89 or above had a severe disparate impact on African Americans. In 2005, the trial court found that this conceded adverse impact was not justified by business necessity because the cut-off score of 89 provided no useful information regarding the relative abilities of test-passers and bore no demonstrable relationship to job performance. The court accordingly held that the City's hiring practice discriminated against African American applicants in violation of Title VII's disparate-impact prohibition.

On appeal, the City did not contest the merits of those findings. Rather, the City challenged only the timeliness of the charges of discrimination that petitioners filed with the Equal Employment Opportunity

Commission (EEOC). The Court of Appeals for the Seventh Circuit found petitioners' charges untimely and reversed. The only question before this Court is whether petitioners were entitled to file charges within 300 days after each of the City's eleven separate uses of its hiring practice to fill firefighter vacancies, or whether petitioners were instead required to file charges within 300 days after the City informed them of their test scores and announced its plan to base its hiring practice on those test results.

1. The City's firefighter hiring practice. In 1995, the City administered a new examination for entry-level firefighter positions to more than 26,000 applicants. Pet. App. 14a. After scoring the test, the City declared that applicants who scored 64 or below (out of a possible 100 points) were "not qualified" to be firefighters, a determination not challenged in this litigation. *Id.* at 1a-2a, 45a. The City also concluded that every applicant scoring 65 or above had passed the test and possessed the cognitive ability to perform successfully as a firefighter. *Id.* at 19a.

Then, against the advice of the test developer, the City arbitrarily divided the pool of qualified persons who passed the test into two groups: applicants who scored 89 or above (whom the City called "well qualified") and those who scored between 65 and 88 (whom the City called "qualified"). *Id.* at 34a, 45a. The City did not divide the pool of qualified applicants into two because it had any factual basis to believe that individuals who scored 89 or above were the best qualified for the job of firefighter—or even that they were better qualified than individuals who scored between 65 and 88. *Id.* at 34a-35a. Rather, as the district court subsequently found, the 89 cut-

off score was a "statistically meaningless benchmark." *Id.* at 34a.

On January 26, 1996, the City sent letters to all applicants notifying them of their test scores and the City's plan for using the test results to hire firefighters. JA 35-36; Pet. App. 46a. The City's letter to applicants with scores between 65 and 88 indicated that their prospects for being hired were uncertain. The letter stated: "[I]t is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list . . . for as long as that list is used." JA 35; Pet. App. 46a. Applicants with scores below 65 were told that they were not eligible and would no longer be considered. Pet. App. 47a.

Also on January 26, 1996, the City issued a press release announcing the general results of the test and its plan to select those who would proceed to the next stages in the hiring process by using a random lottery to choose only from among applicants who scored at or above the 89 cut-off score. *Id.*; JA 51-54. The subsequent stages included a physical abilities test, a background investigation, a medical examination, and a drug test. Pet. App. 14a-15a. Applicants who passed these stages would be hired as firefighter candidates. *Id.* at 15a. Firefighter candidates would become full-fledged firefighters after completing the Chicago Fire Department's training program and passing a state certification exam. *Id.*

The City's press release also described the racial makeup of the group that the City labeled "well qualified" and stated that the City was disappointed

with those statistics. *Id.* at 47a; JA 51, 54. Nonetheless, the City asserted that the test had been "fair." JA 54. Over the next several weeks, articles in the press reported on the disparate racial impact that the City's hiring practice would have. *Id.* at 55-56, 59-60. These articles also quoted City officials who defended the fairness of the test. *Id.* at 74-75, 77.

The City subsequently conceded that the 89 cut-off score had a disparate impact on African American applicants. Pet. App. 12a-13a, 15a, 42a-43a; BIO 4. The City's practice of hiring only applicants who scored 89 or above on the test "meant that white applicants were five times more likely than African-Americans to advance to the next stage of the hiring process." Pet. App. 15a-16a.

2. The City's uses of its hiring practice. Between May 1996 and October 2001, the City hired ten classes of firefighter candidates from the disproportionately white pool of applicants who scored 89 or above on the 1995 test. *Id.* at 16a; R. 405 at 4. The City made exceptions for certain paramedics and military veterans who had scores below 89. Pet. App. 16a.[1]

While filling its eleventh class of firefighter candidates, which was hired in November 2002, the City exhausted the pool of applicants with scores of 89 or

---

[1] Although the City hired paramedics and military veterans with scores below 89, both the court of appeals and the district court referred for convenience to the City's practice of hiring "only" applicants with scores of 89 or above for the ten classes of firefighter candidates hired from May 1996 through October 2001. Pet. App. 4a, 12a-13a. Petitioners follow the same convention here.

above. *Id.*; R. 405 at 4. To fill the remaining spaces in that class, and thereafter until 2007, the City selected at random from among applicants with scores between 65 and 88, even though the City had previously told those applicants that it was "not likely" that they would be selected. Pet. App. 16a, 46a; BIO 4 n.1; JA 35. There was no evidence of any difference between the job performance of firefighters hired with scores at or above 89 and those hired with scores below 89. Pet. App. 33a-37a.

3. Petitioners' EEOC charges and lawsuit. Petitioners are a class of approximately 6,000 African Americans who scored between 65 and 88 and therefore possessed the cognitive ability to perform successfully as firefighters but were not hired by the City between May 1996 and November 2002 because they scored below the 89 cut-off score. R. 58; R. 59.

After the City announced its hiring practice, several of the petitioners met with counsel to discuss their legal options. Pet. App. 48a. Lacking information to challenge the City's public assertions that its new firefighter hiring practice was "fair" under Title VII's standards, counsel requested information from the City regarding the development of the 1995 test and the validation, if any, of the City's practice of hiring only applicants who scored 89 or above. *Id.* at 48a-49a. A series of delays ensued, in part because the test developer still had not completed a validation report documenting the examination and the 89 cut-off score as of July 1996, which was six months after the City announced its hiring practice and declared it was "fair," and two months after it hired the first class of firefighter candidates in May 1996. R. 74, Ex. K ¶¶ 4-6; JA 51-54, 74-75, 77; BIO 4. The

City produced the last of the requested information in January 1997. Pet. App. 48a-49a. Thereafter, on the advice of an expert consultant, counsel concluded that reasonable grounds existed to challenge the City's hiring practice under Title VII. *Id.* at 49a.

To initiate Title VII litigation, petitioners were required to file charges of discrimination with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).[2] The first charge of discrimination by a petitioner was filed by Crawford M. Smith on March 31, 1997. Pet. App. 49a. That date was 430 days after January 26, 1996, the date that the City first announced its hiring practice, but only 181 days after October 1, 1996, the date that the City used its hiring practice to fill its second class of firefighter candidates.[3] Mr. Smith's charge was filed before the City hired nine more classes of firefighter candidates between March 1997 and November 2002, in full or partial reliance on its practice of hiring only applicants who scored 89 or above on the test.[4]

After receiving right-to-sue letters from the EEOC, *see* 42 U.S.C. § 2000e-5(f)(1), petitioners filed

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[2] In certain circumstances not present here, the limitations period is 180 days. *See* 42 U.S.C. § 2000e-5(e)(1).

[3] On May 16, 1996, 319 days before Smith's charge, the City had hired one earlier class of firefighters from among the applicants who scored 89 or above on the test. R. 405 at 4. Petitioners do not contend in this Court that their charges were timely with respect to hires made for that class.

[4] The eleven hiring dates at issue are May 16, 1996; October 1, 1996; March 4, 1997; October 1, 1997; February 2, 1998; February 16, 1999; December 1, 1999; July 17, 2000; February 20, 2001; October 16, 2001; and November 1, 2002. R. 405 at 4.

this lawsuit in 1998, alleging that "[t]he City of Chicago has used and continues to use as its threshold hiring criterion the results of" the 1995 test to hire only applicants who scored 89 or above, in violation of Title VII's disparate-impact prohibition. JA 1-2.

4. The district court's timeliness ruling. In February 2000, the City moved for summary judgment on the ground that petitioners' charges of discrimination were untimely. R. 64. The City contended that the only potential Title VII violation occurred in January 1996, when the City notified petitioners that they had scored below the 89 cut-off score and announced its practice of hiring only applicants who scored 89 or above on the test. Pet. App. 52a. Because petitioners failed to file charges within 300 days after that date, the City contended that the suit was time-barred. *Id.*

The district court denied the City's motion. The court concluded that if "the City's examination had a disparate impact on African-American candidates, then the City's ongoing use of the examination's results—rather than some other, non-discriminatory criteria for candidate selection—has the same disparate impact," *id.* at 60a; and thus the City's "ongoing reliance on those results" would violate Title VII. *Id.* at 69a. Because petitioners' charges were filed within 300 days of the second date on which the City used its practice of hiring only applicants who scored 89 or above on the test, the district court held that the suit was not time-barred. *Id.* at 69a-70a.

5. The district court's liability finding. The district court certified a class in 1999, R. 59,[5] and held a trial on the merits of petitioners' disparate-impact claims in January 2004. Under § 703(k) of Title VII, when an employer "uses a particular employment practice that causes a disparate impact on the basis of race," it violates Title VII's disparate-impact prohibition unless (i) the employer demonstrates that the practice is job-related and consistent with business necessity *and* (ii) there are no equally valid, less-discriminatory alternatives. 42 U.S.C. § 2000e-2(k)(1)(A), (C); *see also id.* § 2000e-2(a)(2), (h).

At trial, the City conceded that the 89 cut-off score had a disparate impact on African American applicants, but defended its practice of hiring only applicants who scored 89 or above as job-related. Pet. App. 12a-13a, 15a, 28a, 42a-43a; BIO 4. After the trial concluded, the district court rejected this defense, holding that the City had unlawfully discriminated against African Americans in violation of Title VII by repeatedly using its hiring practice to fill ten full classes (and a portion of an eleventh class) of firefighter candidates. Pet. App. 28a-43a.

The district court held that "the City failed to prove that test results could be used to predict firefighter performance, *i.e.*, that those who scored 89 or

---

[5] The class consists of "all African American firefighter applicants who took and passed the 1995 written firefighter examination given by the City of Chicago who received a score of 65 or greater but less than 89, but who, as a result of their test scores, have been and continue to be denied the opportunity to take the physical performance test and to be hired as firefighters." R. 58 at 1.

higher on the 1995 Test were more qualified for the job than those who scored between 65 and 89."[6] *Id.* at 30a. The court found the City had known from the outset that the 89 cut-off score was "statistically meaningless" because, as the test developer had communicated to City officials, the cut-off score "fail[ed] to distinguish between candidates based on their relative abilities." *Id.*; *see also id.* at 20a-22a, 35a.

As the court also noted, the City had already acknowledged in the course of defending another lawsuit that the "cut score was not set by the City because it believed that individuals who scored 89 or higher were the best qualified candidates for the job of firefighter," or "that they were better qualified than individuals who obtained a score between 88 and 65." *Id.* at 34a-36a (internal quotation marks omitted). Rather, the City selected the 89 cut-off score over its test developer's objection and for reasons of "administrative convenience"—namely, "simply to limit the number of candidates selected for further processing." *Id.* at 34a-35a; *see also id.* at 22a.

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[6] The district court also found that the test "was skewed towards one of the least important aspects of the firefighter position at the expense of more important abilities." Pet. App. 32a. The test had a heavily weighted component that required applicants to answer multiple-choice questions after watching a video demonstration about the operation of a fictitious device. Performance on this video component hinged, as the district court found, "almost entirely on a *single* skill—the candidate's ability to take notes" during the video demonstration, which was "not [a] particularly important" skill for the firefighter position. *Id.* at 31a-32a. Among the 46 identified abilities required for the job, note-taking ranked "dead last." *Id.* at 32a.

The district court rejected the City's assertion that its hiring practice was justified by "administrative convenience," finding that any legitimate administrative interest could have been satisfied by the equally valid and less-discriminatory alternative of selecting applicants "at random from the pool of candidates who passed the 1995 Test" by scoring 65 or above. *Id.* at 35a; *see also id.* at 41a. The City, in fact, subsequently used this alternative from 2002 through 2007 to hire numerous applicants with scores between 65 and 88 after it exhausted the pool of applicants with scores at or above 89. *Id.* at 16a; BIO 4 n.1. The court noted that despite this on-the-job experience with applicants from both pools of test-passers, the City presented no evidence that firefighters who scored between 65 and 88 performed worse on the job than those who scored 89 or above. Pet. App. 36a-37a.

Based on its holding, the district court entered judgment for petitioners and ordered injunctive relief. *Id.* at 43a; R. 405.

6. The court of appeals' ruling. On appeal, the City did not defend its use of the 89 cut-off score to distinguish among applicants with passing scores. Nor did it challenge the merits of the district court's finding of a Title VII disparate-impact violation.[7] Instead, the City argued only that petitioners' EEOC

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[7] Accordingly, as this case comes to the Court, there is an unchallenged finding that the employment practice in question had a disparate impact and was neither job-related nor consistent with business necessity—in contrast to *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), where the Court found "no genuine dispute that the examinations were job-related and consistent with business necessity." *Id.* at 2678.

charges were time-barred. *See* Pet. App. 2a; BIO 6. The United States Court of Appeals for the Seventh Circuit agreed and reversed. Pet. App. 1a-11a.

The court held that petitioners "were injured, and their claim accrued, when they were placed in the 'qualified' category of the hiring list on the basis of their score in the firefighters' test; for that categorization delayed indefinitely their being hired." *Id.* at 9a. In the court's view, the City's subsequent hiring only of "well qualified" applicants "was the automatic consequence of the test scores rather than the product of a fresh act of discrimination." *Id.* at 4a. Hence, the 300-day period started running no later than the date petitioners were informed that they had been sorted into the lower-scored group of test-passers and the City announced its plan to hire only applicants who scored 89 or above. *Id.* Because the earliest charge was filed more than 300 days after that date, the court held that petitioners' suit was time-barred. *Id.* at 3a-7a.[8]

The court remanded with instructions to the district court to enter judgment for the City. *Id.* at 11a. After the court of appeals denied a petition for rehearing en banc, *id.* at 71a, this Court granted certiorari on September 30, 2009.

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[8] The court of appeals resolved two further questions not at issue in this Court. First, it held that the "continuing violation doctrine" did not apply to petitioners' charges. Pet. App. 7a-9a. Second, the court held that the time for filing charges had not been equitably tolled by the City's actions, including its delay in producing information about the development of its hiring practice. *Id.* at 9a-11a.

SUMMARY OF THE ARGUMENT

Petitioners alleged—and ultimately proved—that the City's practice of hiring as entry-level firefighters only applicants who scored 89 or above on the 1995 test violated Title VII's prohibition against disparate-impact discrimination. The City used this practice in a manner that selected whites at five times the rate of African Americans, even though the 89 cut-off score did not provide any information regarding the relative abilities of test-takers and bore no demonstrable relationship to expected job performance. The text of Title VII compels the conclusion that petitioners timely filed their EEOC charges challenging the City's repeated uses of this practice and thus requires reversal of the court of appeals' holding to the contrary.

I. Section 703(k) provides that where an employer fails to establish the requisite business necessity defense, "[a]n unlawful employment practice based on disparate impact" occurs each time the employer "uses a particular employment practice that causes a disparate impact on the basis of race." 42 U.S.C. § 2000e-2(k)(1)(A). Here, on each occasion that the City filled firefighter vacancies, it "use[d]" the "particular employment practice" of hiring only applicants who scored 89 or above on its 1995 test. This practice had a severe disparate impact on African Americans, and the City failed to meet its burden of demonstrating that the practice was job-related. Accordingly, under the plain language of § 703(k), each time the City hired firefighter candidates, a Title VII disparate-impact violation occurred and a new charge-filing period began.

This plain meaning of § 703(k) is supported by other provisions of Title VII, including § 703(h), which provides that the utilization of a professionally developed test is unlawful if "such test, its administration or action upon the results is . . . used to discriminate." 42 U.S.C. § 2000e-2(h). Actual hiring decisions are the quintessential "action upon the results" of a hiring test. Moreover, under the plain meaning of the statute, the City violated Title VII every time it used its hiring practice to fill firefighter vacancies, even if it also violated the statute when it took such preliminary steps as sorting test-takers based on their scores and creating an eligibility list. The fact that a Title VII violation may be related to earlier acts of discrimination does not prevent a new claim from accruing, and a new charge-filing period from commencing, with the occurrence of subsequent acts that independently violate the statute.

II. The Court has long held that a claim accrues when all elements of a Title VII violation are present. Thus, in a disparate-*treatment* case—where the defining element is intent—the charge-filing period runs from the date of the employer's adoption of an intentionally discriminatory practice, and does not begin to run again merely because the plaintiff later suffers the consequences of the original intentional discrimination, absent a subsequent intentionally discriminatory act. By contrast, in a disparate-*impact* case, where discriminatory intent is not a required element, the Court has recognized that the charge-filing period "run[s] from the time that impact is felt." *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 908 (1989). The Court confirmed this principle in *Ledbetter v. Goodyear Tire & Rubber Co.*,

550 U.S. 618 (2007). While holding that the plaintiff could not challenge her current salary under Title VII's disparate-treatment prohibition because she had not filed a charge within the charge-filing period after her employer's intentionally discriminatory pay-setting decision years earlier, the Court noted that she would not face the same "obstacles" if she challenged her current salary under the Equal Pay Act, because "the EPA does not require . . . proof of intentional discrimination." *Id.* at 640.

III. The court of appeals ignored the statutory text and misread this Court's decisions. The text of Title VII contains no exception for what the court of appeals characterized as the "automatic consequence" of the City's initial decision to sort test-passers into groups who scored above and below the 89 cut-off score. To the contrary, § 703(k) prohibits employers from "us[ing]" a non-job-related hiring practice that causes a disparate impact, and § 703(h) forbids "action upon the results" of a discriminatory hiring test, regardless of whether those violations were consequences—automatic or otherwise—of earlier violations. Unlike the Title VII prohibition against disparate treatment, which forbids only acts taken with an unlawful motive but not the subsequent effects of those acts, consequences are the very touchstone of a disparate-impact violation.

There is, likewise, no basis in Title VII or this Court's decisions for a rule limiting the City's disparate-impact liability merely because it took the intermediate step of putting applicants' names and test scores on an eligibility list for convenience, and then relied on the list in making hiring decisions. It is not uncommon for employers to use test results, as

the City did here, to make hiring or promotion decisions for a number of years after a test is administered. If Title VII prohibited only the creation of a test-based list, but not the City's uses of its hiring practice to fill firefighter vacancies, the limitations period in this case would have expired long before the vast majority of those vacancies were ever filled. Title VII should not be construed to require such an odd result absent a clear and express statutory command. Here, the text of Title VII and this Court's cases require the opposite result.

IV. The result in this case not only is compelled by the text of Title VII, but also achieves the purposes of the statute. It promotes certainty, appropriately balances the interests of employees and employers, and avoids unnecessary charge-filing.

ARGUMENT

I. The text of Title VII establishes that a disparate-impact violation occurred, and a new charge-filing period started, every time the City filled firefighter vacancies.

Section 706(e) of Title VII requires that an individual seeking to challenge employment discrimination must first file a charge with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). In applying this provision, the "critical questions" are: "What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002). The "answer [to these questions] varies with the practice." *Id.*; *see also id.* at 110-17 (recognizing different accrual rules for dis-

crete acts of intentional discrimination and hostile work environment claims).

Where, as here, the unlawful employment practice at issue violates Title VII's disparate-impact prohibition, the answer to the Court's timeliness questions is found in the text of § 703(k). 42 U.S.C. § 2000e-2(k)(1)(A)(i). Under § 703(k), a violation of the statute occurred each of the eleven times the City filled firefighter classes "using" its unlawful employment practice of hiring only those applicants who scored 89 or above on the 1995 test—because, as the district court found, that cut-off score caused a disparate impact on African Americans and was a "statistically useless method of evaluating candidates" that "provided no information regarding the relative abilities of the test-takers." Pet. App. 34a-35a; *see also id.* at 42a-43a. This plain statutory meaning is confirmed by other pertinent provisions of Title VII, and holds true even if the statute also was violated by preliminary actions that the City took prior to hiring.

A. Under the plain meaning of § 703(k), the City violated Title VII each time it used its practice of hiring only applicants who scored 89 or above on the 1995 test.

1. Section 703(k), enacted as part of the Civil Rights Act of 1991, is "the disparate-impact [portion of the] statute." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75.[9] It

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[9] Section 703(k) was enacted to codify aspects of the disparate-impact theory of Title VII liability "enunciated by the Supreme Court in *Griggs* . . . and in the other Supreme Court

provides that "[a]n unlawful employment practice based on disparate impact is established" when an employer "uses a particular employment practice that causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(A). If a plaintiff establishes this prima facie showing of a disparate-impact violation, the employer is liable unless it successfully defends the practice as job-related and consistent with business necessity. *Id.*[10]

In determining when disparate-impact claims accrue under § 703(k), the key statutory terms are "employment practice," "uses," and "causes a disparate impact." *Id.* A disparate-impact violation occurs, and therefore the charge-filing period starts running, whenever an employer "uses" a "particular employment practice" that "causes a disparate impact" and as to which the employer is unable to demonstrate job-relatedness. *Id.*

2. The Court has "stressed the need to identify with care the specific employment practice that is at issue." *Ledbetter*, 550 U.S. at 624 (citing *Morgan*, 536 U.S. at 110-11). The particular employment practice that petitioners challenged—and that the district court concluded was unlawful—was the City's practice of hiring as firefighter candidates only those applicants who scored 89 or above on the 1995 test. Pet. App. 13a, 29a, 35a, 42a-43a. It is well

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decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." Civil Rights Act of 1991, § 3(2), 105 Stat. at 1071.

[10] An employer who successfully demonstrates that an employment practice is justified by business necessity may still be liable if there are less-discriminatory alternatives that it refused to adopt. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).

settled that hiring constitutes an employment practice that can be challenged as a disparate-impact violation. *See Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (holding that a prima facie disparate-impact case is established by showing "that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern").

3. Title VII does not define the word "uses." In the absence of a statutory definition, "the meaning of the verb 'uses' has to turn on the language as we normally speak it." *Watson v. United States*, 552 U.S. 74, 79 (2007). The Court has explained that "the word 'use,' in legislation as in conversation, ordinarily signifies 'active employment,'" *Jones v. United States*, 529 U.S. 848, 855 (2000) (quoting *Bailey v. United States*, 516 U.S. 137, 143 (1995)), which denotes "action and implementation." *Bailey*, 516 U.S. at 145 (citing dictionary definitions).

Under this ordinary meaning, whenever an employer implements a hiring practice to fill specific job positions, it "uses" that practice. *See, e.g., Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 585 (1983) (describing a Title VII disparate-impact challenge to several written examinations "that were used to make entry-level appointments"). Applied here, the City actively employed and implemented—it *used*—its hiring practice on each of the eleven occasions that it selected certain test-passers (those who scored 89 or above) and not others (petitioners and others who scored between 65 and 88) to fill spots in a class of firefighter candidates.

From the outset of this litigation, the City's own characterization of its hiring practice has relied on

the same plain-meaning understanding of the word "use." In its answer to the complaint, the City stated that "since 1996 and continuing to the present time, it has used the results of the 1995 fire fighter entrance examination as part of its process for hiring probationary firefighters in the Chicago Fire Department." R. 163 (Am. Answer ¶ 10); JA 22 (Answer ¶ 10) (same); *see also* R. 163 (Am. Answer ¶ 1) ("Defendant admits that it *has used and continues to use* results of the 1995 fire fighter entrance examination as part of its fire fighter hiring process." (emphasis added)); JA 16 (Answer ¶ 1) (same). In other words, as the City conducted each new round of hiring from 1996 to 2002, it "use[d] a particular employment practice" for hiring that was based on the test results. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

4. The City's hiring practice "cause[d] a disparate impact," *id.*, each time it filled a class of firefighter candidates, because each use disproportionately excluded qualified African American applicants from its ongoing firefighter hiring.

Disparate impact is caused if the employment practice "in question select[s] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *accord Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). In Title VII cases, the relevant pool of applicants encompasses those who are qualified for the position in question. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, § 3(2), 105 Stat. at 1071; *see also N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 585-86 (1979).

Here, each of the City's repeated uses of its practice of hiring only applicants who scored 89 or above "cause[d] a disparate impact" under the terms of § 703(k), based on a comparison of the racial makeup of those who were actually hired as firefighter candidates with the racial makeup of the pool of qualified applicants. *See Albemarle*, 422 U.S. at 425; *Wards Cove*, 490 U.S. at 650-51. The pool of qualified applicants in this case was the pool of individuals, including petitioners, who took the test and received a passing score of 65 or above. By passing the test, petitioners demonstrated that they were fully qualified to advance to the next stages of the hiring process. Pet. App. 19a. As the City conceded at trial, applicants who scored 89 or above were not more qualified than those who passed the exam but fell short of the 89 cut-off score. *Id.* at 36a-37a, 42a. But as a result of the City's cut-off score, in each class of firefighter candidates, African American applicants were selected at rates far lower than the percentage that they represented in the pool of qualified applicants. R. 366 at 1-4 & attach. B (shortfall analysis for the hire date of each class of firefighter candidates); Pet. App. 15a-16a.

In addition, although it was not petitioners' burden to establish the lack of job-relatedness, it is an adjudicated fact that the City's repeated uses of this hiring practice were neither "job related" nor "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Under the district court's unappealed findings, the City's 89 cut-off score was "statistically meaningless" and revealed nothing about whether an applicant who scored 89 or above was more quali-

fied to be a firefighter than an applicant who scored between 65 and 88. Pet. App. 30a, 34a-35a.

5. Thus, under the plain text of § 703(k), each time the City used its practice of hiring only applicants who scored 89 or above on the 1995 test, it committed an "unlawful employment practice based on disparate impact." 42 U.S.C. § 2000e-2(k)(1)(A).[11] Under the charge-filing requirement of § 706(e), a charge filed within 300 days of any such use was therefore timely. *Id.* § 2000e-5(e)(1). Petitioners met this requirement by filing charges within 300 days of the City's use of its practice to hire a second class of firefighter candidates.

B. Sections 703(h) and 703(a)(2) confirm that a new act of disparate-impact discrimination occurred each time the City used its hiring practice.

Sections 703(h) and 703(a)(2) of Title VII confirm that a new act of discrimination occurred under § 703(k)—and a new charge-filing period started—

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[11] The unappealed findings of the district court are in accord with numerous other decisions holding that the use of a non-job-related cut-off score that causes a disparate impact in employment decisions constitutes a violation of Title VII. *See, e.g., Isabel v. City of Memphis*, 404 F.3d 404, 413-14 (6th Cir. 2005); *Guardians Ass'n of the N.Y. City Police Dep't v. Civil Serv. Comm'n*, 633 F.2d 79, 105-06 (2d Cir. 1980), *aff'd on other grounds*, 463 U.S. 582 (1983). The *Uniform Guidelines on Employee Selection Procedures*, which establish a federal standard for employment testing, *see* 29 C.F.R. § 1607.1(A), similarly provide that "[w]here cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force." 29 C.F.R. § 1607.5(H); *see also* 29 C.F.R. § 1607.14(B)(6).

each time the City used its practice of hiring only applicants who scored 89 or above on the test. Section 703(k) is Congress's most recent and comprehensive provision prohibiting disparate-impact discrimination; but the Court recognized long before the enactment of § 703(k) that § 703(h) and § 703(a)(2) prohibit employment practices that operate to discriminate on the basis of race, even if they are not motivated by discriminatory intent. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1, 433-36 (1971); *accord Connecticut v. Teal*, 457 U.S. 440, 450-52 (1982). Both § 703(h) and § 703(a)(2) were enacted as part of the Civil Rights Act of 1964, and were not modified when Congress enacted § 703(k) as part of the Civil Rights Act of 1991. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(2), (h), 78 Stat. 241, 255, 257.[12] These provisions support the conclusion that a new act of disparate-impact discrimination occurs each time an employer fills specific job vacancies by using a hiring practice that causes a non-job-related racially adverse impact.

1. The "ability test" provision of § 703(h) provides that it shall not "be an unlawful employment practice for an employer to give and to act upon the

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[12] As enacted in 1964, Title VII exempted state and local employers such as the City. *See* Civil Rights Act of 1964, § 701(b), 78 Stat. at 253. Congress amended Title VII in 1972 to include state and local governments as covered employers. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 103. The Equal Employment Opportunity Act of 1972 also amended § 703(a)(2) to provide that "applicants for employment" are protected by this section. Equal Employment Opportunity Act of 1972, § 8(a), 86 Stat. at 109.

results of any professionally developed ability test provided that such test, its administration *or action upon the results* is not designed, intended or *used* to discriminate because of race." 42 U.S.C. § 2000e-2(h) (emphases added). The Court has described § 703(h) as "defining what is and what is not an illegal discriminatory practice." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 69 (1982) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 761 (1976)). Section 703(h) thus provides, in certain cases, a defense to an employer's "action upon the results" of a professionally developed employment test. 42 U.S.C. § 2000e-2(h). Employers may act upon the results of such a test unless that action (or the test or its administration) is "designed, intended or used to discriminate." *Id.*

This provision in § 703(h) makes sense only if "action upon the results" of a discriminatory, non-job-related test is included among the unlawful employment practices that the statute generally forbids—which it clearly is. In *Griggs*, this Court relied on § 703(h) to invalidate an employer's use of general intelligence tests to make job assignment and promotion decisions, because those selection devices had an adverse effect on African American employees and were not job-related. *Griggs*, 401 U.S. at 425-28, 433-36; *see also id.* at 436 ("What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."); *Teal*, 457 U.S. at 451-52; *Albemarle*, 422 U.S. at 425 & n.21.

The proscription contained in § 703(h) plainly encompasses the City's practice of hiring only applicants who scored 89 or above on the test. Each use

of that hiring practice constituted "action upon the results" of a test in a manner that was "used to discriminate" against petitioners, contrary to § 703(h). *See Guardians Ass'n of the N.Y. City Police Dep't v. Civil Serv. Comm'n*, 633 F.2d 232, 249 (2d Cir. 1980) (holding that "the results of the [unlawful employment] tests were in effect being 'used to discriminate,' in direct contravention of § 703(h) of Title VII, each time a member of the plaintiff class was denied a chance to fill a vacancy"), *aff'd on other grounds*, 463 U.S. 582 (1983).

2. This conclusion is further confirmed by § 703(a)(2), which provides that it is an "unlawful employment practice . . . to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." 42 U.S.C. § 2000e-2(a)(2).

The plain text of § 703(a)(2), which embraces all employment practices that "limit" "applicants for employment" and thereby "deprive . . . any individual of employment opportunities," *id.*, encompasses each of the City's rounds of hiring only applicants who scored 89 or above on the 1995 test.[13] Each use of this practice "limit[ed]" the "applicants for employment" that the City considered, and consequently "deprive[d]" petitioners of specific "employment opportunities" for which they had previously applied and

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[13] As discussed *infra* Part I.C, this is so even if the statute *also* would prohibit earlier steps in the City's hiring process, including the sorting of candidates into groups based on their test scores.

proved themselves qualified by passing the test. *Id.* The City therefore violated § 703(a)(2) each time it failed to hire petitioners and instead filled vacancies from the disproportionately white pool of applicants with scores of 89 or above.

This conclusion is bolstered by the Court's recognition that "a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981) (quoting S. Rep. No. 88-867, at 12 (1964)). Section 703(a)(2) "manifests [Congress's] . . . intention to define discrimination in the broadest possible terms." George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1612 (1969).

Sections 703(h) and 703(a)(2) thus confirm that a Title VII disparate-impact claim accrues each time an employer deprives African Americans of employment opportunities by using a practice that does not validly distinguish between the qualifications of the disproportionately white group that are hired and the African Americans who are not.

C. Title VII was violated each time the City used its hiring practice to fill firefighter vacancies, even if the statute also was violated when the City scored and sorted applicants' test results.

The outcome of the foregoing statutory analysis is not altered by the fact that before using its hiring practice to fill multiple classes of firefighter candidates, the City took a number of preliminary steps: it

developed, administered, and scored the test; it made the decision to apply an 89 cut-off score to sort test-passers into "well qualified" and "qualified" groups; it created an eligibility list based on that sorting; and it notified applicants of their scores and announced its plan to hire, for an indefinite period of time, only applicants who scored 89 or above on the test. Pet. App. 45a-48a. Even if one or more of these preliminary steps independently violated Title VII, the City also violated the statute each time it used its hiring practice to fill positions in a class of firefighter candidates.

1. Where there are recurring violations of Title VII, the fact that the later violations may be related to earlier acts of discrimination does not prevent a new claim from accruing (and a new charge-filing period from commencing) with the occurrence of each subsequent act that independently violates the statute. This is so even where the aggrieved individuals had knowledge of the earlier acts of discrimination at the time those earlier acts occurred.

As the Court explained in *National Railroad Passenger Corp. v. Morgan*, "[t]he existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." 536 U.S. at 113; *see also Ledbetter*, 550 U.S. at 636 ("[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations.").

The City's preliminary steps in this case did not prevent new Title VII disparate-impact claims from accruing each time the City used its hiring practice to fill vacancies in a manner that disproportionately rejected qualified African American candidates. As the district court succinctly stated, if an examination used to sort applicants has an unlawful disparate impact, then an employer's use of the test scores to hire applicants "has the same disparate impact." Pet. App. 60a.

2. Sections 703(k) and 703(h) confirm that free-standing disparate-impact violations are separately actionable even if related to prior violations. Section 703(k) provides that a disparate-impact violation is established if an employer "uses" a practice that "causes a disparate impact"; nothing in the text limits the scope of this prohibition to the sorting of test results to create an eligibility list, to the adoption or announcement of such a practice, or to its first use. 42 U.S.C. § 2000e-2(k)(1)(A). Section 703(h) similarly prohibits the "use[ ]" of a test to discriminate, with no language to suggest that when one use of a test is related to subsequent uses, only the initial use of the test is prohibited. *Id.* § 2000e-2(h); *see CSX Transp., Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9, 19 (2007) (rejecting a statutory interpretation that "depends upon the addition of words to a statutory provision which is complete as it stands" (quoting *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 463 (1987))).

In addition, § 703(h) provides that a discriminatory "test," "its administration," and "action upon the results" can each be violations of Title VII, notwithstanding that these violations are necessarily related

to one another. 42 U.S.C. § 2000e-2(h). Otherwise, the statute would lead to the illogical conclusion that the City's use of the test results to hire firefighters was not "action upon the results" of the test.

A contrary reading would also be inconsistent with the purposes of Title VII's disparate-impact prohibition. Congress was not simply concerned with the opportunity to receive a grade on a test or to be placed on an eligibility list. "Passing a test, or being put on an eligibility list, is only a means to the ultimate end of hiring, promotion, or other selection." Barbara T. Lindemann & Paul Grossman, 1 *Employment Discrimination Law* 138 (4th ed. 2007). Rather, a core concern of Congress was to eliminate employment practices that are discriminatory in operation—namely, policies that repeatedly deny jobs or other opportunities to members of a particular group. It is the repeated use of such practices, and their cumulative effect over time, that "operate to 'freeze' the status quo" of racial inequality. *Griggs*, 401 U.S. at 430.

II. Applying the plain meaning of Title VII's disparate-impact prohibition accords with this Court's prior decisions.

Consistent with the plain meaning of Title VII's disparate-impact prohibition, the Court has acknowledged that where discriminatory intent is *not* a required element of a cause of action, a claim accrues when an employer uses a non-job-related employment practice and employees or applicants consequently experience its adverse effect. The Court's decisions regarding claim accrual in the context of Title VII's separate prohibition on disparate-

treatment discrimination—where intent is the defining element of the cause of action—do not require a contrary result.

A. Where discriminatory intent is not a required element of a cause of action, a claim accrues when the impact of an employment practice is felt.

Although this Court has not decided when a Title VII disparate-impact claim accrues, its prior decisions strongly point to the result required by the text of § 703(k). The Court has noted that a violation occurs and a claim accrues whenever the employer uses a non-job-related employment practice and employees or applicants consequently experience its disparate impact.

In *Lorance v. AT&T Technologies, Inc.*, the plaintiffs were demoted through the operation of a seniority system in a collective bargaining agreement. 490 U.S. at 901-02. The Court held that the plaintiffs had no claim that the demotions violated Title VII's prohibition on disparate-treatment discrimination, because the demotions were the neutral result of applying a seniority system adopted by the employer long before the charge-filing period commenced; hence, the post-demotion charges were not timely filed within 300 days of any disparate-treatment violation. *Id.* at 905-06.[14]

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[14] In response to this holding in *Lorance*, Congress amended Title VII to provide that discrimination based on an intentionally discriminatory seniority system occurs "when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system." Civil Rights

The Court contrasted its conclusion, however, with the result that would have been reached in a disparate-impact case. The Court noted that the plaintiffs' allegations "would ordinarily suffice to state a claim" for disparate-impact discrimination, except that § 703(h) protects bona fide seniority systems from challenge on disparate-impact grounds. *Lorance*, 490 U.S. at 904-05. The Court then explained that if the special seniority-system provision in § 703(h) had not applied and the "claim asserted [had been] one of discriminatory impact," the "statute of limitations [would] run from the time that impact is felt." *Lorance*, 490 U.S. at 908; *see also id.* at 906 (stating that under this scenario, "suits [could be brought] against the later effects of the system on disparate-impact grounds" (emphasis omitted)). The plaintiffs in *Lorance* "felt" the disparate impact of the seniority system (and experienced its "later effects") at the time of their demotions. *Id.* at 906, 908.

Similarly, in other contexts where intent is not a defining element of the claim, the Court has also suggested that the limitations period is triggered by each use of a challenged employment practice that causes particular employees to suffer an adverse impact. In *Ledbetter*, for example, the plaintiff alleged that, as early as 1979, she had begun receiving intentionally discriminatory performance evaluations; but she did not file an EEOC charge until 1998, when she contended only that the disparity between her salary and that of similarly-situated

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Act of 1991, § 112, 105 Stat. at 1078-79 (codified at 42 U.S.C. § 2000e-5(e)(2)).

men was the result of intentional discrimination because her employer based its salary decisions on her prior allegedly discriminatory performance evaluations. 550 U.S. at 621-22, 624, 628. The Court held that the plaintiff's charge was not timely because she "ma[de] no claim that intentionally discriminatory conduct occurred during the charging period." *Id.* at 628.[15]

At the same time, the Court carefully distinguished the plaintiff's Title VII disparate-treatment claim from other possible claims that would not have required a showing of discriminatory intent. The Court explained that the plaintiff "would not face the Title VII obstacles that she now confronts" under the Equal Pay Act (EPA) because "the EPA does not require . . . proof of intentional discrimination." *Id.* at 640 (citing 29 U.S.C. § 206(d)(1)). The Court also distinguished statute-of-limitations rules for violations of the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA)—which would again have rendered the plaintiff's claims timely—because those provisions of the FLSA "do[ ] not require proof of a specific intent to discriminate." *Id.* at 641 (citing 29 U.S.C. §§ 207, 255(a)).

Lorance and *Ledbetter* therefore strongly support the conclusion that follows from the text of § 703(k)—that a new claim of disparate-impact dis-

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[15] In response to *Ledbetter*, Congress amended Title VII to provide that discrimination in compensation occurs "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (codified at 42 U.S.C. § 2000e-5(e)(3)(A)).

crimination accrued in this case each time the City used its practice of hiring only applicants who scored 89 or above on the test. Petitioners suffered—or "felt," as *Lorance* put it—a non-job-related disparate impact from that hiring practice on each occasion when the City passed over them and filled a class of firefighter candidates with white applicants who possessed no greater qualifications.

B. This Court's precedents establish that a charge-filing period begins each time a present violation of Title VII exists.

Notwithstanding the discussion of Title VII disparate-impact claims in *Lorance*, the holdings in all of this Court's prior cases involving the accrual of Title VII claims have addressed challenges to intentional discrimination under Title VII's disparate-treatment prohibition. *See, e.g.*, *Ledbetter*, 550 U.S. at 624; *Morgan*, 536 U.S. at 105-06; *Lorance*, 490 U.S. at 905-09; *Del. State Coll. v. Ricks*, 449 U.S. 250, 257-58 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557-60 (1977). As a result, these cases do not control accrual of claims under the distinct statutory text of Title VII's disparate-impact prohibition. 42 U.S.C. § 2000e-2(a), (h), (k)(1)(A).

Nevertheless, the Court's disparate-treatment cases have applied a basic principle that is fully consistent with the disparate-impact claim-accrual rule that results from the plain meaning of § 703(k). The Court has held that a Title VII cause of action accrues, and thus a new charge-filing period starts, when and only when an employer's actions satisfy—at the time of those actions—each of the required elements of a particular type of Title VII violation.

See, e.g., *Ricks*, 449 U.S. at 258 (holding that the timeliness of an EEOC charge turns on "whether any present *violation* exist[ed]" within the charge-filing period (quoting *Evans*, 431 U.S. at 558)); *see also Ledbetter*, 550 U.S. at 624-25; *Morgan*, 536 U.S. at 112-13; *Lorance*, 490 U.S. at 905-08. Conversely, if the employer's actions do not satisfy the required elements at the time of those actions, then those actions do not constitute a Title VII violation.[16]

This analysis explains the Court's holdings in *Ledbetter*, *Lorance*, *Ricks*, and *Evans*. In each of those cases, the Court held that a plaintiff had not established discriminatory intent—"the defining element" of a Title VII disparate-treatment violation, *Ledbetter*, 550 U.S. at 624—within the EEOC charge-filing period. In each case, the fact patterns were similar. An employer carried out two employment actions: the first was allegedly motivated by discriminatory intent, but the second was not. Thus, the employer's second action was not a Title VII disparate-treatment violation at all, because it lacked the element of discriminatory intent required to establish a "present violation" in its own right. *Evans*, 431 U.S. at 558 (emphasis omitted). The Court held in each case that a violation occurred, and a charge-filing period started, only when the intentionally discriminatory action (the first action) was taken—and not later, when its consequences

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[16] This rule is consistent with "the standard rule that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)).

were felt.[17] *See, e.g.*, *Ledbetter*, 550 U.S. at 637; *Lorance*, 490 U.S. at 905-09; *Ricks*, 449 U.S. at 258; *Evans*, 431 U.S. at 558. These disparate-treatment cases establish that intent associated with prior acts cannot be "shift[ed]" to later acts; in a disparate-treatment case, a violation requires present discriminatory intent. *Ledbetter*, 550 U.S. at 629.

In contrast to these disparate-treatment cases, the required elements in a Title VII disparate-impact case do not include discriminatory intent but rather the use of an employment practice that causes an unjustified disparate impact on the basis of race. 42 U.S.C. § 2000e-2(k)(1)(A); *Lorance*, 490 U.S. at 908; *see also* Lindemann & Grossman, 1 *Employment Discrimination Law* 110 ("[D]isparate treatment focuses on discriminatory *intent*, while adverse impact focuses on discriminatory *consequences*."). As this Court has explained, "good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432; *accord Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) ("Proof of discriminatory motive . . . is not required under a disparate-impact theory."). Just as the *Lorance* plaintiffs could have proved all the elements of a disparate-impact violation at the time of their demotions (but for the special protection that Title VII provides for seniority systems), *see* 490 U.S. at 904, 908, the required ele-

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[17] None of these cases involved a disparate-treatment pattern-or-practice claim. The Court has expressly left open the timely filing question with respect to such claims, *Morgan*, 536 U.S. at 115 n.9, and need not resolve that issue in this case.

ments of a disparate-impact claim were established here each time the City used its hiring practice to deny petitioners specific firefighter positions.[18]

III. The court of appeals ignored the statutory text and misread this Court's cases.

The court of appeals ignored the statutory text of Title VII's disparate-impact prohibition. The court instead provided two rationales for concluding that petitioners' charges were untimely filed—both of which are unmoored from the statutory text and inconsistent with congressional intent and this Court's prior cases.

A. There is no exception to liability for uses of a practice that may be the consequence of other violations.

1. The court of appeals concluded that the City's discrimination against petitioners was "complete," and their claims thus accrued, no later than the date that

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[18] The Court's treatment of challenges to facially discriminatory policies further demonstrates that the accrual of Title VII claims depends on the required elements of the particular type of violation at issue. The Court has explained that where an employer adopts a practice that discriminates on its face and repeatedly uses that practice to make employment decisions, each use of the practice evidences discriminatory intent and is therefore a separate Title VII violation. Thus, in *Ledbetter*, the Court explained that when an employer maintains a pay structure that facially discriminates on the basis of race, it "can surely be regarded as intending to discriminate on the basis of race as long as the structure is used." 550 U.S. at 634; *see also Lorance*, 490 U.S. at 912 n.5 ("[A] facially discriminatory system . . . by definition discriminates each time it is applied."); *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam); *id.* at 394-96 (Brennan, J., concurring).

the City announced its plan for hiring only applicants who scored 89 or above on the test. Pet. App. 4a, 6a. In the court of appeals' view, the City's later uses of its hiring practice to fill vacancies were the "automatic consequence" of its prior decision to sort test-passers into groups of applicants who scored above and below the 89 cut-off score and, for that reason, did not independently violate Title VII's disparate-impact prohibition. *Id.* at 4a.

But that characterization does not render the City's reliance on the 89 cut-off score for repeated rounds of hiring anything other than a statutorily proscribed "use." There is no statutory exception in either § 703(k) or § 703(h) for "uses" that are the "automatic consequence" of other uses. 42 U.S.C. § 2000e-2(h), (k)(1)(A); *see supra* Part I.C. In disparate-impact analysis, a discriminatory consequence is precisely what Title VII forbids: "Congress directed the thrust of the Act to the *consequences* of employment practices." *Griggs*, 401 U.S. at 432.[19]

2. The court of appeals justified its reasoning by reference to this Court's decision in *Ricks*. Pet. App. 4a (citing *Ricks*, 449 U.S. at 257-58). But *Ricks* was a Title VII disparate-treatment case that did not purport to decide when a claim accrues in a disparate-impact case.

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[19] In any event, on the facts of this case, the City's repeated uses of its unlawful hiring practice were *not* the automatic consequence of its decision to sort applicants based on an 89 cut-off score. Even after the City announced its hiring practice, it had to make other decisions each time it filled firefighter classes. For instance, it needed to determine the number of job openings and to decide whether this hiring practice still controlled. Pet. App. 16a; BIO 4 n.1.

Moreover, the court of appeals misread *Ricks*. In *Ricks*, a college professor alleged that his denial of tenure had been the result of intentional discrimination on the basis of national origin, but he did not file an EEOC charge within the charge-filing period after his employer notified him of the tenure denial. 449 U.S. at 252-54. Rather, he filed more than a year later, shortly before the expiration of the additional one-year terminal contract that professors denied tenure customarily received. *Id.* This Court concluded that "the only alleged discrimination occurred . . . at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* at 258.

The court of appeals erroneously inferred that *Ricks* established an "automatic consequence" exception to disparate-impact liability based on this Court's comment that the expiration of the professor's one-year terminal contract was not a distinct disparate-treatment violation because it was "a delayed, but inevitable, consequence of the denial of tenure." *Id.* at 257-58. But that comment merely explained why the termination of the professor's one-year contract was not intentionally discriminatory, and therefore did not satisfy at the time of termination the defining element of a disparate-treatment claim. *See id.* at 258, 262. The Court did not purport to create any sort of broader rule.

The court of appeals' analysis also is contrary to this Court's statements that "a freestanding violation may always be charged within its own charging period regardless of its connection to other viola-

tions." *Ledbetter*, 550 U.S. at 636; *see also Morgan*, 536 U.S. at 113.[20] Here, unlike in *Ricks*, each round of hiring only applicants who scored 89 or above on the test constituted a freestanding, present violation of Title VII's disparate-impact prohibition that started a new and distinct charge-filing period. *See supra* Part I.C.

B. The creation of an eligibility list is not an intervening act that immunizes an illegal hiring practice.

The court of appeals also separately suggested that the City's employment practice was in fact three practices: the City's decision to start hiring from only those applicants who scored 89 or above (labeled "well qualified"), followed by the creation of an eligibility list consisting solely of "well qualified" applicants, followed by hiring in reliance on that eligibility list. Pet. App. 4a-5a. The court reasoned that only the first practice was a violation of Title VII, that the second was an "intervening neutral act," and that the third was not a violation of Title VII "because 'well qualified' is not a racial category, though its racial composition may have been influenced by a discriminatory decision taken earlier." *Id.* at 5a. This approach cannot be reconciled with Title VII's text or this Court's decisions.

The court of appeals' reasoning ignores the plain meaning of § 703(k) and § 703(h). Under that plain meaning, it is evident that when the City selected

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[20] In addition, the court of appeals' analysis is inconsistent with the premise that a facially discriminatory practice can be challenged at any time. *See Ledbetter*, 550 U.S. at 634; *see also supra* p.37 n.18.

applicants on the eligibility list—that is, applicants who scored 89 or above—it necessarily used the results of the test and cut-off score in a manner that caused an unlawful disparate impact. Courts, including this Court, routinely refer to the "use" of a test to make employment decisions—even in circumstances where the employer sorts the results of the test and creates an eligibility list for administrative purposes. *See, e.g., Guardians Ass'n*, 463 U.S. at 585-86 & n.5 (characterizing written examinations as being "used to make entry-level appointments," even though the appointments were in practice based on a ranked list generated from the exam results).[21]

The court of appeals' approach would lead to absurd results. An employer could avoid liability under Title VII for later uses of an unlawful employment practice simply by sorting the results of the practice and creating an eligibility list more than 300 days prior to using the practice to hire. Title VII liability would then turn on whether an employer had taken the intervening step of creating a list before making hiring decisions—indeed, it could turn on arbitrary distinctions as to whether a particular manner of processing test results sufficiently transformed those

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[21] *See also, e.g., Adams v. City of Chicago*, 469 F.3d 609, 610-11 (7th Cir. 2006) (describing an "examination used to promote officers," even though the examination was utilized to generate a ranked promotional list, which was then used to make promotions); *Guardians*, 633 F.2d at 249 (holding that test results "were in effect being 'used to discriminate' . . . each time a member of the plaintiff class was denied a chance to fill a vacancy," even though the test results had first been compiled into lists (quoting 42 U.S.C. § 2000e-2(h))).

results into a "list." *Cf. Watson*, 487 U.S. at 990 ("If we announced a rule that allowed employers so easily to insulate themselves from liability under *Griggs*, disparate impact analysis might effectively be abolished.").[22]

In an analogous context, this Court addressed a university admissions process that first converted raw applicant data into a "selection index" and then made decisions based on that index. *See Gratz v. Bollinger*, 539 U.S. 244, 255 (2003). In the university's system, each applicant could receive up to a maximum of 150 points based on a host of factors, including 20 points based on membership in an underrepresented racial group. *Id.* Notwithstanding the university's prior creation of a selection index, the Court held that the university's admissions decisions constituted an impermissible "use of race." *Id.* at 275.

Attaching legal significance to the mere creation of an eligibility list, in between setting a cut-off score and relying on it for actual hiring decisions, also could result in a largely prospective charging period—one that might expire before the results of a test are used in hiring at all. Applied in this case, it would mean that challenges to the vast majority of

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[22] Moreover, if the court of appeals' analysis were extended to other federal statutes, any law forbidding the use of particular information could be evaded by first compiling the information into a list. For instance, an investment brokerage firm could obtain insider information and put that information onto a list of securities to be sold. Under the court of appeals' approach, the firm would be entitled to argue that it did not use the insider information, only the neutral list, when it sold the securities. *See* 15 U.S.C. § 78p(b) (preventing the "unfair use" of insider information).

the City's illegal hires were time-barred before any hiring took place. The Court should not read a statute to require such odd results unless the text expressly requires it, which in this instance it does not. *See Chandler v. Roudebush*, 425 U.S. 840, 848 (1976) ("[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." (quoting *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925))).

Even if the City's repeated hiring decisions based on the results of the 1995 test *were* "neutral" acts, that characterization would not avoid liability. Title VII's disparate-impact prohibition was enacted specifically to address "practices, procedures, or tests neutral on their face, and even neutral in terms of intent." *Griggs*, 401 U.S. at 430; *see also Dothard*, 433 U.S. at 329 ("[A] plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.").[23]

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[23] The court of appeals' opinion might also be read to suggest that the charge-filing period runs from the adoption and announcement of an employment practice. Pet. App. 4a, 6a. But it is untenable to hold that *only* the adoption and announcement of a policy can be a disparate-impact violation. In many circumstances, an employer's adoption and announcement of a hiring practice without more only amounts to a declaration of its intention to use that practice at some future date. *Cf. Am. Tobacco*, 456 U.S. at 69-70 (explaining that "[t]he adoption of a seniority system which has not been applied would not give rise to a cause of action. A discriminatory effect would arise only when the system is put into operation and the employer 'applies' the system.").

IV. An accrual rule that follows the statutory text achieves the purposes of Title VII.

The result in this case is controlled by the plain language of Title VII. In such cases, the Court's duty is to execute the statute as written, not to ground its decision on policies that are not based in the text. *See Am. Tobacco*, 456 U.S. at 75. In fact, however, this is a case where the proper result "finds support not only in the text of the statute but also in the basic policies underlying the statutory scheme." *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 68 (1998).

A. Clear rules promote certainty.

A "basic polic[y]" of any limitations provision is the promotion of "certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). In the Title VII context, this policy requires clear, easily applied rules for determining when claims accrue.

Under the correct rule for disparate-impact claims, which is based on the statutory text of § 703(k) as discussed in Part I *supra*, a claim accrues when an employer uses a practice that disparately and unjustifiably impacts employment opportunities for employees or job applicants. 42 U.S.C. § 2000e-2(k)(1)(A)(i). At that time, all elements of a Title VII disparate-impact violation are present. This rule is predictable in application and will promote certainty for plaintiffs and employers alike. By contrast, the court of appeals' approach does not provide certainty for any party in determining when a disparate-impact claim accrues. An inquiry that would depend on whether a particular use of a practice was the

"automatic consequence" of an earlier act, Pet. App. 4a, would promote litigation about causation that is best avoided.[24]

B. A text-based approach balances the interests of employees and employers.

An accrual and charge-filing rule that respects the statutory text of Title VII's disparate-impact prohibition also properly "balances the interests of aggrieved employees against the interest in encouraging the 'prompt processing of all charges of employment discrimination,' and the interest in repose." *Ledbetter*, 550 U.S. at 642 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980)).

1. The accrual rule required by the text of § 703(k) fulfills Congress's intent by assuring that victims of discrimination are not denied redress simply because they do not file an EEOC charge when an unlawful practice is first announced or used. *See Gunther*, 452 U.S. at 178 (emphasizing the need to "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate"); *cf. Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008) ("Title VII . . . sets up a 'remedial scheme in which laypersons, rather than lawyers, are expected to initiate the

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[24] For example, an employer may change some aspects of the practice after its original announcement, leading to disputes over whether a particular use is the "automatic consequence" of the original practice. Indeed, in this case, there was a mid-course change in the City's hiring practice. After the City exhausted the pool of applicants with scores of 89 or above, it decided to continue to use the 1995 test results to fill firefighter candidate classes by selecting from among applicants who scored between 65 and 88. Pet. App. 16a; BIO 4 n.1.

process.'" (quoting *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988))).

By contrast, the court of appeals' rule will generally start the only charge-filing period for a disparate-impact challenge running upon the initial announcement of the employment practice at issue. Yet until the practice is actually used to make employment decisions, affected employees or applicants will have limited incentive to institute a legal confrontation with an employer by filing EEOC charges.

An employer could take advantage of this reality by adopting and announcing a practice with a foreseeable disparate impact, but delaying its implementation until 300 days after its promulgation; if no one files an EEOC charge during the intervening period, the court of appeals' rule would provide license for the employer to continue using the practice indefinitely. Indeed, an employer could be better off leaving in place a potentially discriminatory test rather than developing a new one and thus opening itself to new allegations of discrimination. The court of appeals' rule would thus deter employers from voluntarily complying with Title VII, contrary to congressional intent. *See Ricci*, 129 S. Ct. at 2674 (recognizing "Congress's intent that 'voluntary compliance' be 'the preferred means of achieving the objectives of Title VII'" (quoting *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986))).

2. The court of appeals suggested that its holding might be necessary to avoid allowing plaintiffs to initiate suit challenging an examination "ten years" after they received notification of their scores. Pet.

App. 9a. This overstates the risk of delay. Employees and job applicants have every incentive to file promptly once they are concretely affected by an employer's unlawful practice.

An aggrieved employee or applicant presumably needs the employment opportunity that has been denied. That need encourages prompt assertion of the claim. In addition, delay in instituting EEOC proceedings affects the scope of the remedy. Backpay, for example, is allowed only for the two years immediately prior to the filing of a charge. 42 U.S.C. § 2000e-5(g)(1). And the passage of time can make it more difficult to hire or reinstate a successful Title VII plaintiff into the position that he or she was denied. *See* Lindemann & Grossman, 2 *Employment Discrimination Law* 2721-22 & nn.73-78.

3. The accrual rule required by § 703(k) also respects employers' legitimate interest in repose. Title VII's charge-filing deadlines are motivated in part by concerns that an employer's ability to defend itself may be impaired due to fading memories or the unavailability of evidence. In *Ledbetter*, the Court noted that "concerns regarding stale claims weigh more heavily with respect to proof of the intent associated with employment practices than with the practices themselves" because "evidence relating to intent may fade quickly with time." 550 U.S. at 631.

These concerns have little force in Title VII disparate-impact cases because the employer's subjective intent is not an element of the cause of action. 42 U.S.C. § 2000e-2(k)(1)(A), (C); *Griggs*, 401 U.S. at 432. Rather, liability typically turns not on the testimony of fact witnesses but on objective evidence

and expert testimony regarding disparate impact, test validation, business necessity, and less-discriminatory alternatives. *See* 42 U.S.C. § 2000e-2(k)(1)(A), (C). Such evidence is unlikely to erode over time. And the EEOC's *Uniform Guidelines on Employee Selection Procedures* already require employers to maintain records documenting impact and validity evidence for a practice that has a racially disparate impact. 29 C.F.R. §§ 1607.5(D), 1607.15.

Moreover, employers have no legitimate interest in repose from challenges to *repeated* Title VII violations caused by their multiple uses of the same practice, simply because the first such violation was not challenged. A freestanding Title VII violation that is related to an earlier violation may be made the subject of a timely charge even if the earlier violation was not. *See supra* Part I.C; *Ledbetter*, 550 U.S. at 636; *Morgan*, 536 U.S. at 113. In short, an employer that uses a non-job-related selection practice, as the City did here, is the master of its own repose—it can end its exposure to suit by ceasing use of the discriminatory practice.

C. The court of appeals' alternative encourages unnecessary charge-filing.

Any consideration of the costs of delayed EEOC charges challenging practices on disparate-impact grounds must consider the opposite side of the coin: the costs of encouraging plaintiffs to file premature and unnecessary charges.

Under the court of appeals' rule, any time an employer adopts a practice that has a disparate impact against a protected group, the only prudent course of action is for affected individuals to file an immediate

EEOC charge, even if they have not yet suffered any practical harm, and even if they lack information as to whether the practice might be job-related. In the present case, for example, when the City first announced its hiring practice and admitted to its disparate impact, petitioners had insufficient facts to contest the City's assertion that the test was "fair." Pet. App. 48a-49a; JA 54, 74-75, 77.

Thus, the court of appeals' approach provides an undesirable incentive to file EEOC charges based only on "raw racial statistics," notwithstanding this Court's recent discouragement of such a course of action. *Ricci*, 129 S. Ct. at 2681. Employees or job applicants should not be compelled as a matter of law to initiate legal confrontations with an employer before they can determine the actual consequences of the practice for them.

Nor should this Court embrace an accrual rule that encourages the filing of charges that may prove unnecessary. In this case, the court of appeals held that the only charge-filing period began to run upon announcement of an employment practice that had an unjustified disparate impact. But there could well have been no practical injury if shortly after the City scored the test and announced its planned hiring practice, it had decided to cancel or to indefinitely delay the hiring of new employees for financial or other reasons.[25] Judicial and administrative

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[25] In recent months, many cities and states have faced financial difficulties that have compelled hiring freezes or layoffs. *See, e.g.*, Gregory Beyer, *The Barred Door*, N.Y. Times, Feb. 13, 2009, at CY1 (detailing the New York Fire Department's announcement that it would indefinitely defer entry-level firefighter hiring).

economy are not well served by a rule that requires employees to initiate litigation upon the adoption or announcement of practices that may never be applied to cause them practical harm.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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NOVEMBER 23, 2009

RESPONDENT'S BRIEF

No. 08-974

IN THE

Supreme Court of the United States

ARTHUR L. LEWIS, JR.; GREGORY S. FOSTER, JR.; ARTHUR C. CHARLESTON, III; PAMELA B. ADAMS; WILLIAM R. MUZZALL; PHILIPPE H. VICTOR; CRAWFORD M. SMITH; ALDRON R. REED; and AFRICAN AMERICAN FIRE FIGHTERS LEAGUE OF CHICAGO, INC., individually, and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Who is entitled to receive an attorney's fee awarded under the Equal Access to Justice Act in a Social Security disability case: the attorney who earned it through knowledge, skill, and industry, or her indigent client, who has not paid her attorney, and for whom the money would be a windfall?

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RELEVANT STATUTES

The relevant statutes are set out in the Appendix to this brief.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

The Commissioner of Social Security found that Ruby Willow Kills Ree was entitled to Title XVI (Supplemental Security Income) disability benefits based on diabetes, arthritis, reactive airway disease, adjustment disorder with depressed mood, and borderline intellectual functioning.[1] Attorney Catherine Ratliff, a sole practitioner in Hot Springs, South Dakota, sued the Commissioner on Kills Ree's behalf, alleging that Kills Ree was entitled to additional benefits. The district court granted Kills Ree leave to proceed *in forma pauperis*.[2]

The district court ruled that Kills Ree was entitled to two months' additional benefits.[3] Under EAJA, Ratliff moved for an award of attorney's fees of $2,112.60 and South Dakota sales tax of $126.75, totaling $2,239.35. The Commissioner did not oppose

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[1] *Kills Ree v. Barnhart*, Civ. No. 04-5119 (D.S.D. Sept. 28, 2005). Ratliff has asked the Clerk for permission to lodge this decision, which is also cited in the government's brief.

[2] Eighth Circuit Joint Appendix at 21.

[3] *Kills Ree v. Barnhart*, *supra*, at 8-9.

the motion, and the district court entered judgment accordingly.[4] Two weeks later, the Department of the Treasury wrote Kills Ree that it had taken the entire $2,239.35 to apply to an unrelated debt that Kills Ree owed the federal government, leaving Ratliff with nothing.[5] Ratliff sued the Commissioner for her fee. The district court ruled against her.[6] The Eighth Circuit reversed.[7]

B. Social Security Cases and EAJA Fees

In Social Security cases, an attorney may lawfully receive a fee in only two ways. One is from the government under EAJA. The other is from the government out of the client's past-due benefits, either awarded by the court (which happens in only five percent of such cases) or after a remand. If past-due benefits are awarded, the Commissioner pays the attorney a fee of up to 25% of the past-due benefits, based on the fee contract between the attorney and the client.[8] In 1985, Congress specified in EAJA that

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[4] Pet. App. 23a.

[5] *Id.* at 21a-22a.

[6] *Id.* at 10a-16a.

[7] *Id.* at 1a-9a, reported at 540 F.3d 800 (2008).

[8] The controlling statutes are EAJA (28 U.S.C. 2412), the Social Security Title II fee provisions (42 U.S.C. 406(b)(1)(A) and (b)(2)), and the Social Security Title XVI fee provisions (42 U.S.C. 1383(d)(2)(A)), all of which are reprinted in the Appendix to this brief. The Social Security Administration's data showing that only five percent of court cases resulted in an award of benefits during fiscal year 2007 are at http://waysandmeans.

(Continued on following page)

if "the claimant's attorney receives fees" for the same work under EAJA and from the client's past-due benefits, the attorney must refund the smaller fee to the claimant.[9] In 2005, Congress extended the direct payment system for Title II fees to Title XVI Social Security cases such as this one.[10]

Titles II and XVI use the same definition of "disability."[11] Title II requires that the claimant have worked enough to become "insured"; Title XVI requires that the claimant be poor. As this Court has

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house.gov/media/pdf/111/ssgb.pdf (last visited January 4, 2010) at 1-80.

If a remand eventually results in an award of benefits by the agency, the attorney can return to federal court and request a fee award under the Social Security Act for services provided in federal court. *Bergen v. Commissioner*, 454 F.3d 1273, 1276-77 (11th Cir. 2006). (For cases handled before the agency, but not cases in federal court, under certain conditions, an attorney may obtain a deposit from a client into the attorney's trust account, subject to later approval by the Social Security Administration. Social Security Ruling 82-39, available at http://www.socialsecurity.gov/OP_Home/rulings/oasi/39/SSR82-39-oasi-39.html (last visited December 20, 2009)).

[9] Section 3 of the Act of August 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186, 28 U.S.C. 2412 note. *See also Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002).

[10] Pub. L. No. 108-203, § 302(a)(1)(A), 118 Stat. 519 (2004). This law became effective on March 1, 2005, and sunsets on February 28, 2010. *Id.* § 302(c), 42 U.S.C. 1383 note; *see* 72 Fed. Reg. 44,766 (August 9, 2007). Until the enactment of this statute, courts had no authority to withhold past-due benefits to pay attorney's fees in Title XVI cases. *Bowen v. Galbreath*, 485 U.S. 74 (1988).

[11] *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003).

noted, "Title II is an insurance program. . . . Title XVI is a welfare program."[12] Title XVI benefits are "designed to help aged, blind, and disabled people, who have little or no income." The program provides "cash to meet basic needs for food, clothing, and shelter."[13] A person with more than minimal income or assets is not eligible for Title XVI benefits.[14]

This Court noted in 1990 that EAJA fee awards in Social Security cases averaged less than $3,000.[15] EAJA fees remain modest. In fiscal year 2006, SSA paid 5,481 EAJA fee awards, in an average amount of $3,573.47.[16] More than 91% of the federal district court cases reported in 2008 involving EAJA were Social Security cases.[17]

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[12] *Bowen v. Galbreath*, 485 U.S. 74, 76 (1988).

[13] http://www.ssa.gov/ssi/index.htm (last visited December 20, 2009).

[14] http://www.ssa.gov/ssi/text-eligibility-ussi.htm and http://www.ssa.gov/ssi/text-resources-ussi.htm (last visited December 20, 2009).

[15] *Commissioner, INS v. Jean*, 496 U.S. 154, 164 n.12 (1990).

[16] Declaration of Candace Wienckowski, Fiscal Management Analyst, Social Security Administration, *Williams v. Astrue*, No. 06-0427-SAC (D. Kan.) (document 28-2, filed December 4, 2007).

[17] A LEXIS search on November 14, 2009, showed 902 reported district court cases in 2008 that used the terms "EAJA" or "Equal Access to Justice Act." Of these 902 cases, 19 were the same case reported more than once, so there were 883 different cases. Of these 883 cases, an EAJA motion was made in 646; of these 646, 593 (91.8%) were Social Security cases.

In addition, about 2,400 EAJA fee awards were made in the two most recent fiscal years by the United States Court of Appeals for Veterans Claims.[18] The law governing attorney's fees in veteran-benefit cases parallels the law governing attorney's fees in Social Security cases. Attorneys handling veterans' claims in administrative or court proceedings are limited to a contingent fee of 20% of past-due benefits, which is paid directly to the attorney.[19] And if an attorney in a veterans' case "receives fees" under both a contingent fee agreement and EAJA, the attorney must pay the claimant the amount of the smaller fee.[20]

SUMMARY OF THE ARGUMENT

The plain meaning of "attorney's fee" is a fee for an attorney. But the Commissioner says that an "attorney's fee" awarded under EAJA should be paid to the attorney's *client*, even though the client has not paid the attorney. Here, the government took an attorney's fee awarded under EAJA in a Social Security disability case to pay a client's unrelated debt, leaving the attorney with no fee. The

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[18] http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf (last visited December 20, 2009).

[19] 38 U.S.C. 5904(*d*).

[20] Pub. L. No. 102-572, § 506(c), 106 Stat. 4513 (1992), 28 U.S.C. 2412 note ("Fee Agreements").

government received a windfall—an "economic gain[ ] independent of work, planning, or other productive activities that society wishes to reward"[21]—by not having to pay the attorney's fee it owed. The client received a windfall because her unrelated debt was reduced. The Commissioner justifies these windfalls because, he argues, the client's right to seek an "award" of fees means that the client also has the right to receive the attorney's fee.

But the right to seek an "award" of fees and the right to receive the fees are different. This point is demonstrated by the language Congress used in enacting EAJA in 1980, which had a judicially settled meaning: attorney's fees awarded by a court should be paid to an attorney if necessary to avoid offset of the attorney's fee by the client's creditor or a windfall to the client.

The point is proven again by the language Congress used in amending EAJA in 1985 to specify that an EAJA fee award may be made in a Social Security case. There, Congress recognized that statutory fees are paid to attorneys by providing that where "the claimant's attorney *receives fees*" for the same work under EAJA and the Social Security Act, the attorney must refund the amount of the smaller fee to the claimant (emphasis added). The legislative history of the 1985 amendments to EAJA reinforces the plain language of the statute by confirming that

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[21] Eric Kades, *Windfalls*, 108 Yale L.J. 1489, 1491 (1999).

the amendments "*permi[t] the attorney to seek recovery* under both" EAJA and the Social Security Act, and that the attorney may "*keep* the larger fee. . . ."[22] Thus, "*an attorney collecting attorney fees under the EAJA* would have to use such fees to reduce" any fee withheld from the claimant's benefits under § 406(b).[23]

Congress used "award" as a noun in its 1985 amendments extending EAJA to Social Security cases, where it specified that the Social Security Act "shall not prevent an award of fees" and "shall not apply with respect to any such award" if certain conditions are met. When used as a noun in the context of law, an "award" means a "decision."[24] So the client receives the "award"—the decision awarding the fee—but the attorney receives the fee, the "payment asked or given for professional services."[25]

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[22] H.R. Rep. No. 99-120 at 20 (1985) (emphasis added).

[23] *Id.* at 19 (emphasis added).

[24] *Webster's New World Dictionary* 97 (2d College Edition 1978). Similar definitions abound. *American Heritage Dictionary* 92 (1981) ("[a] decision, as one made by a judge or arbitrator"); *West's Legal Thesaurus/Dictionary* 77 (1986) ("[t]he decision of a body or entity"); *Black's Law Dictionary* 157 (9th ed. 2009) ("[a] final judgment or decision.").

[25] *Webster's New World Dictionary* 512 (2d College Edition 1978). *West's Legal Thesaurus/Dictionary* 318 (1986) defines "fee" as "payment for a service." *Black's Law Dictionary* 690 (9th ed. 2009) defines "fee" as "[a] charge for labor or services, esp. professional services."

Alternatively, even if an EAJA fee award were nominally payable to a Social Security claimant, the attorney would have a beneficial interest in the payment that would exempt it from offset. The attorney's fee is for the benefit of the attorney, and, if paid to the client, should be impressed with a trust in favor of the attorney. Such treatment of EAJA fees is consistent with traditional equitable principles, under which an implied or constructive trust arises "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."[26] And the government's regulations do not allow offset if a payment to a person is made "solely in that person's capacity as a representative payee for another person having the beneficial interest in the payment."[27]

After EAJA was enacted the Commissioner had to decide to whom to pay awards of attorney's fees. Until 2006, the Commissioner paid them to attorneys, but then reversed field by adopting his present theory, which apparently applies only to cases in which the plaintiff owes a debt to the government. (In cases in which the plaintiff does not owe the government a debt, the Commissioner apparently still pays attorney's fees to attorneys, if the client has assigned to the attorney the right to receive the fee.)

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[26] *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).

[27] 31 C.F.R. 285.5(e)(5).

The Commissioner's present theory is based on an erroneous reading of *Evans v. Jeff D.*, 475 U.S. 717 (1986), and *Venegas v. Mitchell*, 495 U.S. 82 (1990). But contrary to the Commissioner's reading of those cases, they do not speak to the question of who ultimately receives attorney's fees awarded by a court, and this Court has repeatedly said that attorney's fees awarded under fee-shifting statutes are paid to attorneys. These decisions are consistent with the common understanding that attorney's fees are paid to attorneys, not to their clients.

The Commissioner conjures up a host of theoretical problems with paying attorney's fees, expenses, and costs to attorneys. But he does not cite even one case of such a problem actually occurring in the 30 years since EAJA was enacted. The absence of any such cases demonstrates that the Commissioner's concerns are groundless. Worse, the Commissioner's proposal—that fees, expenses, and costs awarded under EAJA should be paid to the client, where the client has not paid or advanced them—would create genuine practical problems. If paid to Social Security claimants, many attorney's fee and costs checks will not reach the attorney.

The Commissioner's approach is not, as the government argues, necessary to avoid disputes over who should receive payment of fees and costs. Existing attorney ethics rules in every state strictly regulate how attorneys handle funds, including payments of attorney's fees, expenses, and costs, if more than one person may have an interest in them. Attorneys who

violate these rules are subject to significant punishment, even disbarment. The rules work well. But the Commissioner's approach would displace these state rules, by paying awards of fees, expenses, and costs to clients (and thereby permitting the government to take them to pay the clients' debts to it), no matter who should receive them. There is no evidence that Congress intended the extraordinary result of federalizing this area traditionally reserved to state law.

Finally, the Commissioner's theory would subvert not only EAJA but most other fee-shifting statutes as well, because most such statutes use language similar to EAJA's "award to a prevailing party" standard. Most conspicuously, 42 U.S.C. 1988, which provides that a court may "allow the prevailing party" a fee in a civil rights case, would be sabotaged. Attorneys in those cases would no longer know whether any fees they might earn would be taken by their client's creditors or spent by their client. The purpose of fee-shifting statutes is to motivate attorneys to take appropriate cases by paying their fees and reimbursing any expenses and costs they have advanced if they win. Attorneys are much less likely to take such cases if when they win they are not paid and are not even reimbursed for the costs they advanced.

ARGUMENT

I. The text of EAJA contemplates that attorney's fees in Social Security cases will be received by attorneys.

A. Section 3 of the 1985 amendments to EAJA distinguishes between an "award" of attorney's fees and the attorney's right to "receive" the fees.

According to the Commissioner, an EAJA attorney's fee in a Social Security case, earned by the attorney, should be paid to the attorney's indigent client and may be taken to pay the client's debt to the government, even though the client has not paid the attorney. This strange result is supposedly required by EAJA's provision that "a court shall *award to a prevailing party* other than the United States *fees and other expenses* . . . incurred by that party in any civil action. . . ."[25] To be sure, the "prevailing party" is the client, not the attorney. *Evans v. Jeff D.*, 475 U.S. 717, 730 (1986). But the text of § 3 of the 1985 amendments to EAJA expressly incorporates a critical distinction that courts have long recognized: the distinction between the right to an "award" of fees, and the right to "receive[ ]" the fees. This distinction is necessary to avoid a windfall to the client (who under the Commissioner's theory would have her debt to the government reduced) and to the government (which would retain the funds it otherwise

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[25] 28 U.S.C. 2412(d)(1)(A) (emphasis added).

would have paid to the attorney) at the expense of the attorney (who earned the fee but would not receive it).

Section 3 of the 1985 EAJA amendments provides:

> Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an *award* of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such *award* but only if, where *the claimant's attorney receives fees* for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code [EAJA], the claimant's attorney refunds to the claimant the amount of the smaller fee.[29]

The Commissioner's argument that Congress equated the right to an "award" of fees under EAJA with the right to "receive[ ] fees" is foreclosed by the language of the statute, which expressly distinguishes between the two. The only reading that gives meaning to all the words of the statute is that while the client may apply for an "award" of EAJA fees (that is, a decision that fees are due[30]), the attorney is entitled to

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[29] Act of August 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186, 28 U.S.C. 2412 note (emphasis added).

[30] *See* P. 7, *supra*, P. 15-16, *infra*.

"receive" the EAJA fees, and the attorney keeps the larger of the EAJA fee or the § 406(b) fee (if any).

According to the Commissioner, the purpose of § 3 is to avoid the prohibition on an attorney receiving a fee in a Social Security case other than under section § 406(b).[31] Although this is indeed *one* purpose of § 3, the other purpose is to be sure that the attorney does not *keep* both fees. This point had to be addressed because Congress understood that attorney's fees are paid to attorneys.

The Commissioner argues that the refund provisions of § 3 apply only if the attorney, after not receiving the EAJA fee, happens to come into possession of it. This unlikely scenario has the client receiving the EAJA fee, then giving it to the attorney, who then shuffles it back to the client if it is less than the § 406(b) fee. There is no evidence that Congress contemplated EAJA fee checks being shuffled back and forth between attorneys and clients.

Had Congress intended that EAJA attorney's fees be paid initially to Social Security claimants, Congress would have provided that if (and only if) the EAJA fee exceeds the § 406(b) fee, the *claimant* must pay the excess to the attorney, instead of providing that the *attorney* must pay the smaller fee to the claimant. That Congress instead intended both fees to be paid to the attorney in the first instance is

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[31] Pet. Br. at 26 n.8.

confirmed because the statute requires that the attorney *refund* the smaller fee to the client, rather than requiring that the attorney may *collect* only the amount by which the EAJA fee exceeds the § 406(b) fee. That § 3 uses the term "refund" in the general sense of "pay," rather than in the sense of "[t]he return of money to a person who overpaid,"[32] is evident because the statute requires the attorney to "refund" the amount of whichever fee is smaller, the § 406(b) fee or the EAJA fee. Because the § 406(b) fee is *never* paid initially to the client, the amount of it could never be literally "returned" to the client.

Congress understandably chose the practical and reliable method of routing both fees through the attorney, who is bound by universal state bar ethics rules to distribute the money appropriately. The alternative method—attempting to route attorney's fees through clients who often are destitute—would be highly unreliable. An EAJA fee is typically awarded when a case is remanded from federal court to the agency. *Shalala v. Schaefer*, 509 U.S. 292, 297-99 (1993) (court should enter judgment terminating case when it remands under sentence four of 42 U.S.C. 405(g), which applies in most cases). About 46% of Social Security cases result in a remand for further proceedings, but only 5% result in an award of benefits by the court.[33] On average the agency

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[32] *Black's Law Dictionary* 1394 (9th ed. 2009).

[33] http://waysandmeans.house.gov/media/pdf/111/ssgb.pdf (last visited January 4, 2010) at 1-80.

takes 369 days to process a court remand.[34] So in the large majority of cases (46% to 5%), an EAJA fee awarded when the case is remanded precedes, by about a year, the agency's decision whether it will award benefits, which determines whether there will be a § 406(b) fee. Congress did not intend needy clients to safeguard an EAJA fee for a year while waiting to find out whether they will receive benefits—and if so, whether the EAJA fee will exceed the § 406(b) fee.

The Commissioner cites 28 U.S.C. 2412(d)(1)(B), which requires a party seeking an EAJA award to show that the party is eligible "to receive an award." But "award," when used in legal contexts as a noun (as in "to receive an award") means "decision."[35] Only the prevailing party may receive the *award* (the decision granting fees), but only the attorney who earned the *fee* (the "payment asked or given for professional services"[36]) is entitled to receive it.

EAJA, as enacted in 1980, uses "award" or "awarded" 29 times: 14 times as a noun, 5 times as a past participle, 5 times as an intransitive verb, 3 times as a transitive verb, and twice as a gerund. The

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[34] Social Security Administration, Office of the Inspector General, Hearing Office Remand Processing Audit Report A-12-08-28036, September, 2008, at 5, available at http://www.socialsecurity.gov/oig/ADOBEPDF/A-12-08-28036.pdf (last visited December 20, 2009).

[35] P. 7, *supra*.

[36] *Id.*

Commissioner's brief cites only the definition of the transitive verb.[37] But § 3 of the 1985 amendments uses "award" *only* as a noun ("an award of fees and other expenses" and "with respect to any such award"). So in § 3, as in § 2412(d)(1)(B), the meaning of "award" is "decision." A prevailing party receives an "award"—a "decision"—granting attorney's fees, but the attorney who earned the "fees"—"the payment asked or given for professional services"[38]—receives them. Consistent with EAJA's use of the noun "award," meaning "decision," its use of "award" as a transitive verb (as in 28 U.S.C. 2412(d)(1)(A), "a court shall award to a prevailing party") is most sensibly read to mean that the court shall "give a decision" to a prevailing party.[39]

Any reading of the statute that entitles a client to receive the attorney's fee—and thereby allows the client to spend it, or the government to take the fee rather than pay it to the attorney—defies common sense that attorney's fees are paid to attorneys, not their clients. And in a Social Security case, the

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[37] Pet. Br. at 10 and 15.

[38] P. 7, *supra*.

[39] *Webster's New World Dictionary* 97 (2d College Edition 1978) (award used as transitive verb means "to give by the decision of a law court or arbitrator"). Other dictionaries agree. *American Heritage Dictionary* 92 (1981) ("to grant as merited or due" or "to declare as legally due"); *West's Legal Thesaurus/Dictionary* 77 (1986) ("to grant; to adjudge"); *Black's Law Dictionary* 157 (9th ed. 2009) ("to grant by formal process or by judicial decree.").

attorney has *never* been paid by the client, because such payment is unlawful. As this Court has recognized, "[t]he prescriptions set out in §§ 406(a) and (b) establish the exclusive regime for obtaining fees for successful representation of Social Security benefits claimants. Collecting or even demanding from the client anything more than the authorized allocation of past-due benefits is a criminal offense."[10] Thus, in no Social Security case will an EAJA fee award reimburse the client for fees the client previously paid the attorney, because all fees are paid by the government—both the EAJA fees that come from the government's funds and the § 406 fees that come from the client's past-due benefits.

Finally, the Commissioner points to EAJA's language limiting an award to fees and expenses "incurred by that party" (28 U.S.C. 2412(d)(1)(A)) and argues that this demonstrates Congress's intent that EAJA fee awards be received by prevailing parties, not their attorneys. But § 3 shows that an EAJA fee may exceed the contractual 25% fee allowed under the Social Security Act, so the fee "incurred by" the plaintiff is not limited to the contractual fee. Nor can "incurred by" mean that the client has already paid the attorney because, as explained above, an attorney may not demand such a payment in a Social Security case.

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[10] *Gisbrecht v. Barnhart*, 535 U.S. 789, 795-96 (2002).

At least in the Social Security setting, the only way to make sense of EAJA's "incurred by" language and give effect to all its terms is to read it as the Federal Circuit and Ninth Circuit have, construing "incurred by" to include an obligation for fees that is contingent on an award of fees.[41] In other words, the fees are incurred in the sense that the attorney has performed the work in the expectation of receiving a fee if a fee is awarded under EAJA. Under this reading of the statute, the language "incurred by" supports the attorney's entitlement to receive the EAJA fee, rather than allowing the government to take it to pay the client's unrelated debt or allowing the client to receive it and use it for other purposes.

The Commissioner, as of 2009, agreed with this reading of the statute. He advised a district court that had inquired about his reading of the "incurred by" language that "an award of attorney's fees under EAJA is not necessarily contingent upon an obligation to pay counsel and the presence of an attorney-client relationship is sufficient to entitle the prevailing party to receive a fee award."[42] The Commissioner described this as the "current policy of the Social Security Administration."[43] Later, when the

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[41] *Ed A. Wilson, Inc. v. General Services Admin.*, 126 F.3d 1406, 1408-10 (Fed. Cir. 1997); *Morrison v. Commissioner of Internal Revenue*, 565 F.3d 658, 662-63 (9th Cir. 2009).

[42] *Vinning v. Astrue*, No. 4:08-CV-059-A, 2009 U.S. Dist. Lexis 100896, at **8 (N.D. Tex. October 29, 2009).

[43] *Id.*

same district court ordered him to provide more information, he told the court that his "litigation position" on this issue was "currently under review" by "high-ranking DOJ officials, possibly including the Solicitor General"[44] (possibly as a result of this case).

B. "Attorney's fees" means fees payable to attorneys.

EAJA expressly provides for "attorney fees."[45] This Court's most recent EAJA case, *Richlin Security Service Co. v. Chertoff*, looks to "the traditional meaning of the term 'attorney's fees.'"[46] The traditional meaning of the term "attorney's fees" is fees charged by or paid to an attorney for the attorney's services. "[T]he term [a 'reasonable attorney's fee'] must refer to a reasonable fee for the work product of an attorney." *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).

Consistent with the traditional meaning "attorney's fees," this Court has repeatedly recognized that attorney's fees awarded pursuant to fee-shifting statutes are paid to attorneys:

- "Where a plaintiff has obtained excellent results, *his attorney should recover a fully*

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[44] *Id.* at **12.

[45] 28 U.S.C. 2412(d)(2)(A)(ii).

[46] ___ U.S. ___, 128 S.Ct. 2007, 2015 (2008).

compensatory fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (emphasis added).

- "In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel . . . are employed by . . . a privately funded non-profit public interest law firm. It is in the interest of the public that *such law firms be awarded reasonable attorneys' fees* to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys' fees." *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974) (emphasis added) (ellipses in original)).

- "[A]ny award of costs or fees would inure to the benefit of Idaho Legal Aid." *Evans v. Jeff D.*, 475 U.S. 717, 721 n.2 (1986).

- "[I]f plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that *he will be paid* a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied." *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*) (emphasis added).

- "The issue before us is whether, when a plaintiff prevails, *its attorney should or may be awarded separate compensation* for assuming the risk of not being paid." *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 715 (1987) (*Delaware Valley II*) (emphasis added).

- "As we understand § 1988's provision for allowing a 'reasonable attorney's fee,' *it contemplates reasonable compensation*, in light of all the circumstances, *for the time and effort expended by the attorney* for the prevailing plaintiff, no more and no less." *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) (emphasis added).

- "We . . . take as our starting point the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of . . . attorneys." *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).

- "Although the claimants were named as the appellants below, and are named as petitioners here, *the real parties in interest are their attorneys, who seek to obtain higher fee awards. . . .*" *Gisbrecht v. Barnhart*, 535 U.S. 789, 798 n.6 (2002) (emphasis added).

- "Banks brought his claims under federal statutes that authorize *fee awards to prevailing plaintiffs' attorneys.*" *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426, 438 (2005) (emphasis added).

Further, EAJA provides that "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved,

justifies a higher fee."[47] This provision makes sense only if attorney's fees are paid to attorneys. Congress need not have made an exception to the $125 per hour rate when "the limited availability of qualified attorneys . . . justifies a higher fee" unless the fee was for the attorney. A higher fee paid to the client, rather than to the attorney, would not achieve the purpose of attracting qualified attorneys.

As EAJA's provision for higher fees if qualified attorneys are in short supply illustrates, EAJA seeks to achieve its aims through market mechanisms. Likewise, EAJA measures attorney's fees based on the marketplace. 28 U.S.C. 2412(d)(2)(A) ("prevailing market rates" are used to determine fees). *See Richlin Security Service Co. v. Chertoff*, ___ U.S. ___, 128 S.Ct. 2007, 2013 (2008) (under EAJA, paralegal fees, like all other fees, are measured by "prevailing market rates"). In the marketplace, clients pay fees to attorneys, not vice-versa. EAJA simply shifts to the government the responsibility for paying the attorney's fee.

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[47] 28 U.S.C. 2412(d)(2)(A)(ii).

C. In EAJA, Congress used language with a judicially settled meaning: that an attorney's fee should be paid directly to an attorney if necessary to avoid a windfall to a client or offset by the client's creditor.

When Congress uses terms defined in existing law, it is presumed to intend the same meaning for those terms: "[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Rowe v. N. H. Motor Transp. Ass'n*, 552 U.S. 364, ___, 128 S.Ct. 989, 994 (2008), quoting *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006). This Court has applied this principle to fee-shifting statutes by construing 42 U.S.C. 1988 in light of the statutes and case law preceding the statute's enactment. *Blum v. Stenson*, 465 U.S. 886, 894 n.10 (1984) ("Congress was legislating in light of experience when it enacted the 1976 fee statute"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (Congress patterned § 1988 on the attorney's fee provisions of the Civil Rights Act of 1964). The language Congress used in EAJA in 1980 and 1985—"award to a prevailing party"—had a settled judicial meaning, established in a series of cases predating EAJA: it authorized payment of an attorney's fee directly to the attorney if necessary to pay the attorney and avoid a windfall to the client, or, as in this case, to prevent the client's creditor from offsetting the attorney's fee.

The Fifth Circuit in 1970, in a case in which the fee-shifting statute provided that the court "may allow the prevailing party . . . a reasonable attorney's fee," ruled that "the fees allowed are to reimburse and compensate for legal services rendered and will not go to the litigants, named or class."[48] Similarly, the Seventh Circuit in 1975, in a case in which the fee-shifting statute provided that the court "may grant as relief . . . reasonable attorney fees in the case of a prevailing plaintiff," ruled that "[t]o avoid any windfall, . . . the grant of fees should go directly to the organization providing the services," not to the plaintiff.[49] And the Third Circuit in 1977, in a case in which the fee-shifting statute provided that the court "shall . . . allow a reasonable attorney's fee to be paid by the defendant," ruled that "since the object of fee awards is not to provide a windfall to individual plaintiffs, fee awards must accrue to counsel."[50]

The Fifth Circuit in 1979, in a Truth in Lending Act case in which the fee-shifting statute provided that a creditor who violated a debtor's rights "is liable to that person" in an amount including "a reasonable attorney's fee," rejected a creditor's attempt to offset the attorney's-fee award against the plaintiff's debt. The court reasoned that "[t]o allow a setoff would in effect relieve the creditors in violation of the Act of

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[48] *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539.

[49] *Hairston v. R & R Apartments*, 510 F.2d 1090, 1093.

[50] *Rodriguez v. Taylor*, 569 F.2d 1231, 1245.

race," was injury) (principal opinion); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 141 (1977) ("Even if [respondent] had ultimately been able to regain a permanent position[,] she would have felt the effects of a lower seniority level, with its attendant relegation to less desirable and lower paying jobs, for the remainder of her career[.]"); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 240 n.28 (1982) (seniority determines promotions, transfers, demotions, layoffs, days off, shift assignments, training, overtime, and other privileges).

The hiring eligibility list was also the practice that caused adverse impact. Indeed, the liability trial focused only on the examination and "well qualified" eligibility pool. Hence, "the discriminatory act was the testing itself." *Dickerson v. U.S. Steel Corp.*, 23 FEP Cases 1088, 1091 (E.D. Pa. 1980). Accord *Cox v. City of Memphis*, 230 F.3d 199, 204 (6th Cir. 2000); *Hood v. New Jersey Department of Civil Service*, 680 F.2d 955, 959 (3d Cir. 1982); *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074, 1082-84 (3d Cir. 1981). See generally *Connecticut v. Teal*, 457 U.S. 440, 449 (1982) ("The examination given . . . surely constituted . . . a practice" under Title VII). And petitioners were well informed that they would "not likely" be hired. *E.g.*, J.A. 35.[3] This, then, was the practice that started the limitations clock.

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[3] Whether the discovery rule applies to Title VII is unsettled. See *Ledbetter*, 550 U.S. at 642 n.10; *Morgan*, 536 U.S. at 115 n.7. Regardless, the notice was not too tentative to make petitioners' injury clear. Agencies Br. 10-12; Brief of the National Partnership for Women & Families, *et al.*, as *Amici Curiae* in Support of Petitioners 12 ("Partnership Br."). Petitioners no longer press this issue.

2. Since nobody was assured of being hired, not even those "well qualified," the unlawful practice is not properly characterized as the failure to hire petitioners. Pet. Br. 27; Agencies Br. 2-4, 6, 9, 11, 27. Nor is it hiring from the "well qualified" pool. Pet. Br. 19-20, 26-27; U.S. Br. 14-15, 17, 23-24; Agencies Br. 5, 10-11. A Title VII claim does not depend on whether an employer hires others but whether it "limit[s], segregate[s], or classif[ies]" applicants to deny employment opportunities. While limiting, segregating, or classifying an applicant frequently coincides with hiring someone else, the actionable injury is nonetheless the treatment of the complainant, not others; an applicant allegedly rejected for employment based on race has a claim, even if the employer never fills the position for other reasons (see, *e.g.*, Pet. Br. 49 n.25)

3. Petitioners label the examination and list mere "preliminary steps." Br. 15-18, 26 n.13, 27-30, 40-43; see U.S. Br. 15-16, 23-24. While those steps were the foundation for later hiring eligibility, they were the actionable wrong. The denial of tenure in *Ricks*, the seniority system's adoption in *Lorance*, and the evaluations in *Ledbetter* similarly could be called "preliminary steps"; still, they were the statutory wrongs. Attempts to challenge later events when a charge was too late to challenge the one that caused injury have not persuaded before (see, *e.g.*, *Ricks*, 449 U.S. at 257 (claim of challenge to termination of contract rather than earlier denial of tenure); *Evans*, 431 U.S. at 558 (claim of challenge to seniority rather than earlier forced resignation)), and should not now.

4. Petitioners express concern that Chicago might have never used the list. Br. 42-43, 49-50 & n.25; see U.S. Br. 10, 32-33; Partnership Br. 7, 14. But again,

petitioners' classification limited their employment opportunities regardless whether anyone else was ever hired. If Chicago took the list down before using it, petitioners might have incurred only nominal damages; but uncertainty about damages does not delay accrual. See *Wallace v. Kato*, 549 U.S. 384, 393-97 (2007); *Morgan*, 536 U.S. at 119. Moreover, petitioners could have sought injunctive relief before the list was used (Agencies Br. 24 n.13). So, while non-use could affect relief, it does not affect accrual.

5. That petitioners might be or were hired later (Pet. Br. 45 n.24, 48-49; U.S. Br. 10-11, 32-33; Agencies Br. 3, 10, 12-14, 17; Partnership Br. 3, 11, 13-14) likewise does not affect accrual. Indeed, later consideration or hiring actually ameliorated the injury petitioners suffered when they were excluded from consideration for years. Beyond that, a complainant cannot wait for absolute certainty about the consequences of a practice before filing charges. See *Lorance*, 490 U.S. at 907 n.3; *Chardon*, 454 U.S. at 8; *Ricks*, 449 U.S. at 260-61; *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 234-35 (1976). The clock starts when the unlawful practice occurs, even if some consequences might not be felt until later. Were it otherwise, a claim would accrue only when the complainant decided the consequences had become unacceptable, placing repose entirely in the complainant's hands.

Ricks illustrates this. The college could have altered its tenure decision in Ricks' grievance process; yet, the claim accrued when the tenure decision was communicated to him. See 449 U.S. at 260-61. Ricks could not wait to know whether he would actually lose his job before filing a charge.

Lorance is more dramatic. The women adversely affected by the changed seniority system felt nothing at the time. As the dissent emphasized, "there was no reason to believe" they "would *ever* be demoted," making their injury "speculative." 490 U.S. at 914. The Court rejected this, finding the change "concrete harm." *Id.* at 907 n.3.

6. Once the examination was scored, results announced, and petitioners classified "qualified," they had all they needed to file charges. Indeed, they had more than most complainants – an admitted prima facie case of adverse impact.

Petitioners muddle the information needed for a charge, for a prima facie case, and to defeat a defense in court. Br. 7-8, 49; see U.S. Br. 26, 32. They acknowledge they met with counsel, sought Dr. Outtz's validity study, and conferred with an expert, all before filing charges. They also say counsel concluded "[t]hereafter" that "reasonable grounds existed" to challenge Chicago's practice. Br. 8. But petitioners previously admitted that they began "pursuing" a possible "disparate impact claim" after receiving the notices in January 1996 (R. 74 at 3), and that their counsel knew in April 1996 of the possible "'adverse impact' lawsuit" (*id.* Ex. K ¶2). Counsel then spent months investigating defenses of job-relatedness and validity. *Id.* ¶¶2-9, Exs. A-B; R. 83, Aff. ¶¶2-8, Ex. 1.

That information was not necessary for charges. A charge "is not the equivalent of a complaint initiating a lawsuit"; rather, it starts the EEOC's investigation. *Shell Oil*, 466 U.S. at 68. Thus, the idea that our rule requires complainants "to file first and investigate later" (Agencies Br. 16-17) is correct, but it is not our rule; it is the process Congress crafted. Petitioners

immediately knew they were injured by a decision that might be unlawful. Even a federal lawsuit can be filed with that information. Pet. Br. 35 n.16; Agencies Br. 19. A process "in which laypersons rather than lawyers, are expected" to file administrative charges (*Edelman*, 535 U.S. at 115 (citations omitted)) requires no more.

In particular, pre-charge investigation need not consider possible defenses. Affirmative defenses do not affect accrual. See *Lorance*, 490 U.S. at 908. And an administrative charge, again, is less demanding than a federal complaint, which does not have to plead the nonapplicability of defenses. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). If petitioners wanted to investigate before suing, they should have filed charges and investigated along with the EEOC and, depending on their investigation, did not have to file suit, despite receiving right-to-sue notices. And, by filing charges, petitioners would have had more than informal means to obtain information from Chicago. Telephone calls and FOIA requests may be unproductive, or at least slow to produce results, while a charge would have invoked the EEOC's compulsory process. See 42 U.S.C. §§ 2000e-8 (access to employer's records), 2000e-9 (subpoenas).

Petitioners were injured when they were excluded from hiring. That was an easily identifiable discrete act that occurred when the list based on the examination was adopted and announced. Petitioners' challenge to their classification as "qualified" accrued then. Despite the 300-day charging period, petitioners filed no charge for more than 420 days. The first charge, albeit within 300 days of the list's second use, was not timely to challenge the examination and list.

D. Each Use Of The List Was Not A New Unlawful Practice With Its Own Charge-Filing Period.

Petitioners are reticent to admit the list's adoption violated Title VII (Br. 15, 18, 26 n.13, 27-28), but their amici admit petitioners could have challenged it (U.S. Br. 23-25; Agencies Br. 4-5, 24-25).[4] Yet petitioners did not do so; nor did they challenge the list's first use. The earliest charge happened to be timely to challenge the second use. Petitioners therefore contend that each use of the list constituted a fresh violation of Title VII with its own charge-filing period. Br. 14-43; see U.S. Br. 8-27; Agencies Br. 3-5, 11, 18, 20, 23, 29; Partnership Br. 2, 4-6, 10.[5] That argument is not supported by Title VII's language, this Court's cases, or common sense.

1. Petitioners correctly state that each new Title VII violation starts a new charge-filing period, even if it is related to a prior act, and even if the complainant knew the prior act was discriminatory and did not challenge it. See *Ledbetter*, 550 U.S. at 636; *Morgan*, 536 U.S. at 113; Pet. Br. 15, 28, 48; U.S. Br. 9, 17 n.2, 21-22; Agencies Br. 4, 25-26; Partnership Br. 17. But petitioners err in claiming a new violation occurred each time Chicago used the list because the examination and cut-off score were "unlawful" (U.S.

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[4] Nonetheless, petitioners cite cases challenging cut-off scores. Br. 23 n.11. Timeliness was not at issue in those cases.

[5] Petitioners' current theory does not reach the list's adoption or even first use. Br. 8 & n.3, 23; see U.S. Br. 5; Agencies Br. 4. The district court's judgment included those, based on the continuing-violation doctrine. Pet. App. 7a-9a, 45a, 52a-70a; R. 74 at 4-9, 308, 390, 405. If petitioners were to prevail on their new theory, a remand would be necessary to modify that judgment. Agencies Br. 18; U.S. Br. 28-29.

Br. 10, 17, 24, 26-27, 31; Agencies Br. 21), "invalid" (U.S. Br. 10, 15, 23, 28, 31-32; Partnership Br. 4, 29), or a "violation" (U.S. Br. 18). Disparate impact of the examination and list is not a new violation; it is the one that is time barred. Indeed, at this point, it is not even fairly called a violation. Once petitioners (admittedly) did not timely challenge the list, it is "treat[ed] . . . as lawful" (*Evans*, 431 U.S. at 558). Thereafter, hiring those previously deemed "well qualified" did not itself "limit, segregate, or classify" applicants because of race. The classification of "well qualified" is facially neutral, and the list was used in a neutral manner.

Machinists v. NLRB, 362 U.S. 411 (1960), precludes an argument that, with charges timely only to challenge use of the list, petitioners can rest on proof that the examination and 89 cut-off score had disparate impact.[6] There, at a time the union lacked majority status, the contract contained a union-security clause. See *id.* at 412-14. Employees filed charges outside the six-month filing period (29 U.S.C. § 160(b)), claiming the contract and its continued enforcement were unlawful (see 362 U.S. at 412-14). This Court held the charges untimely because their "entire foundation" was "the Union's time-barred lack of majority status when the [contract] was signed." *Id.* at 417. "In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign." *Ibid.* "In any real sense, then, the

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[6] Title VII was modeled on the NLRA, and consideration of cases under that statute is appropriate. See *Zipes*, 455 U.S. at 395 n.11. Both statutes share the "highly unusual feature of requiring an administrative complaint before a civil action can be filed." *Lorance*, 490 U.S. at 909; accord *Ledbetter*, 550 U.S. at 641.

complaints in this case are 'based upon' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution." *Id.* at 423. Permitting that would undermine the purpose of the limitations period, repose, stability in labor relations, and Congress's intent. See *id.* at 425-29. See also *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147, 1157-59 (10th Cir. 2000) (claim against contract based on lack of majority status untimely even though contract was enforced within limitations period); *General Marine Transport Corp. v. NLRB*, 619 F.2d 180, 188 (2d Cir. 1980) (repudiations of contract were merely repetition of earlier conduct, not separate unfair labor practices); *NLRB v. Pennwoven, Inc.*, 194 F.2d 521, 524-26 (3d Cir. 1952) (employer refused to reinstate employees allegedly laid off for union activities; later refusal was not new practice, just adherence to prior unchallenged decision).

2. The unchallenged ruling on liability (Pet. Br. 3-4, 12-13 & n.7; U.S. Br. 7-8) does not establish a disparate-impact violation every time Chicago used the list (Pet. Br. 21-22, 41; U.S. Br. 10-12, 17, 24; Agencies Br. 5, 29), for the simple reason that petitioners never proved, or even attempted to prove, that use of the list had disparate impact. Likely that is because their accrual theory at that time was a continuing violation; petitioners did not assert their recurring present-violation theory until two years after the liability trial (R. 302 at 1-2).[7] They have

[7] This omission may also reflect the difficulty of proving that use of the list had adverse impact on petitioners since, once they failed to challenge the examination results, they could not rely on the disparity between the racial composition of the pool of

now abandoned reliance on a continuing violation (Br. 13 n.8), but the district court's timeliness ruling rested on that (Pet. App. 45a) (denying summary judgment under continuing-violation doctrine; each use of the list would have same adverse impact as examination and list). The liability ruling, therefore, does not support a new or repeated violation.

To be clear, we do not argue that use of the list can never be charged as a new violation simply because it is related to the examination petitioners failed to challenge. Pet. Br. 15, 28, 48; U.S. Br. 21, 24. Our submission is that petitioners did not prove that use of the list was a new violation.

3. Nor does it matter whether classifying applicants "well qualified" was an "intervening" act (Pet. Br. 40-41; U.S. Br. 24) or "intermediate step" (Pet. Br. 16; U.S. Br. 24), or that use of the list "followed" the classification of petitioners as "qualified" (Pet. Br. 40; U.S. Br. 15) or "followed" other violations (U.S. Br. 22; see *id.* at 18, 21). Arguments about causation miss the mark because they ignore that there was no present violation when Chicago used the list for hiring.[8]

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test-takers and the pool of applicants called for further processing. Whatever the reason petitioners did not attempt to prove adverse impact from any use of the list, the fact remains they did not.

[8] *Gratz v. Bollinger*, 539 U.S. 244 (2003), is different. There the "selection index" was used when the university considered applicants (see Pet. Br. 42); that is why there was no issue of untimeliness. By contrast, the practice that excluded petitioners here was used only to make the list, and their challenge to the list was untimely. This does not mean statutory prohibitions can be "evaded." *Id.* n.22. It just means charges must be timely.

In this light, petitioners' recurring present-violation theory is just their abandoned continuing-violation theory clothed in new terms. Pet. Br. 29; U.S. Br. 26. See also Pet. Br. 9; U.S. Br. 6 (district court's continuing-violation findings). They challenge Chicago's continued reliance on the list and the "well qualified" category because of its disparate impact on African-Americans, but support the claim that this was a present violation only with the finding that the examination had disparate impact, especially when used with an 89 cut-off score. This conduct needed no repetition to be unlawful (Pet. Br. 30) and did not injure petitioners except when the list was made. The notion that disparate impact resulting from one act can be made the subject of a later charge merely because the impact continues (U.S. Br. 17) is wrong. If there is no "*further*" impact (*ibid.*), the charge is directed at a stale violation. The same is true of the idea that the charge properly challenged the examination's "raw results" (*id.* at 24; see *id.* at 16), when it was filed too late to challenge the examination.

4. Nor did Chicago revisit the decision to call only "well qualified" applicants until that pool was depleted. Petitioners state that "[e]ven after the City announced its hiring practice, it had to make other decisions each time it filled firefighter classes. For instance, it needed to determine the number of job openings and to decide whether this hiring practice still controlled." Br. 38 n.19. Their amici add that Chicago "went through several rounds of hiring, each time reviewing the same lists of candidates." Agencies Br. 11. There is no support for these assertions. Chicago made one decision that injured petitioners, which was announced in January 1996 and followed through 2001. While Chicago calculated the number of "well qualified" candidates to call for each round of

hiring, that caused petitioners no injury. Those were not decisions about how to use the examination results; that decision already had been made. Ten times, when the list was used, those "qualified" applicants were excluded based on the prior decision. In 2001, when only 40 "well qualified" applicants remained and no new list had been adopted, Chicago started calling from the "qualified" category. While that was a new decision, it too did not injure petitioners; petitioners filed no charges over it; and its only effect was to ameliorate petitioners' injury.

5. Petitioners rely (Br. 15; see *id.* at 31-34; U.S. Br. 10, 19, 22-23; Partnership Br. 6, 10, 17) on the statement in *Lorance* that the charging period for disparate-impact claims under section 2000e-2(a)(2) would "run from the time that impact is felt" (490 U.S. at 908). That statement is *dictum*, since *Lorance* did not (and could not, see 42 U.S.C. § 2000e-2(h)) involve a disparate-impact claim. In any event, petitioners felt the impact at the adoption of the list, which limited hiring to "well qualified" applicants. That decision excluded petitioners from hiring eligibility for several years; it did not make Chicago's hiring decisions merely "somewhat" more predictable (U.S. Br. 23). As we explain, the entire impact of that decision was felt immediately; subsequent uses of the list did not affect petitioners. Tellingly, no one identifies any impact that was not felt right away, although it is repeatedly claimed. *E.g.*, Pet. Br. 34; U.S. Br. 23. Indeed, precisely because using the list limited petitioners' employment opportunities "in the exact same way" as "us[ing] the raw test results" (U.S. Br. 16), later use of the list had no disparate impact at all. If anything, the odds of petitioners' being hired increased the more the list was used.

6. The intimation that the employer's failure to remedy known disparate impact is tantamount to disparate treatment (U.S. Br. 25-26) should be put aside. Petitioners never properly advanced or proved a disparate treatment claim. Beyond that, as we explain, once the time passed to challenge the examination and list, Chicago was entitled to treat them as lawful. Lawful decisions do not have to be changed, regardless of their present effects. This rule is settled for disparate-treatment claims – an employer that knows of but does not remedy the present effects of prior discriminatory treatment does not commit a present violation. See *Ledbetter*, 550 U.S. at 634-36 & n.5 (discussing *Bazemore*); *Morgan*, 536 U.S. at 112-13; *Ricks*, 449 U.S. at 261 n.15.

Petitioners urge a different rule for disparate-impact claims because they require no proof of intent. Thus, although the consequences of discriminatory treatment do not create a present violation (*e.g.*, *Ledbetter*, 550 U.S. at 629), the consequences of disparate impact are said to be forever actionable (Pet. Br. 15-16, 30-36, 38, 43; U.S. Br. 9-10, 22, 33; Partnership Br. 8-10).[9] But consequences do not violate Title VII's disparate-impact prohibition, any more than they violate its disparate-treatment provision. Petitioners were required to file charges within 300 days of a practice that actually caused disparate impact. They should not be permitted to circumvent

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[9] The Solicitor General notes the Court "has not held that the sole purpose of Title VII's disparate-impact provision is to smoke out covert intentional discrimination." Br. 25. Nonetheless, construing it as something other than an evidentiary tool raises constitutional problems (see *Ricci*, 129 S. Ct. at 2681-83 (Scalia, J., concurring)), which the Court prefers to avoid.

that omission on the ground that every consequence of a practice with disparate impact is a separate violation.

The same accrual rules should apply to disparate-impact and disparate-treatment claims. While Congress has decided that a different rule is appropriate in some contexts – like seniority systems or compensation (see 42 U.S.C. §§ 2000e-5(e)(2), (3)(A)) – it has made no distinction based on the manner in which the complainant proves an unlawful practice. None should be imposed on the statute. See *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2349 (2009); *Edelman*, 535 U.S. at 117-18; *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7 (1987). Nor would such a distinction make sense, and it would be difficult to apply. The facts might bear both theories, and the complainant might not know at the charge-filing stage which to pursue. And if there is any difference in when the two claims accrue, the greater moral culpability of disparate treatment should prolong the life of those, not disparate-impact, claims.

7. Petitioners' new-found statutory construction argument, based on sections 2000e-2(h) and (k), fails as well.[10] To start, petitioners' assertion that the court of appeals "ignored the statutory text of Title VII's disparate-impact prohibition" (Br. 37; see *id.* at 16; U.S. Br. 18; Partnership Br. 2, 6-7) is unfair. Petitioners never cited section 2000e-2(k) to that court, nor relied on it for timeliness in the district court; and cited section 2000e-2(h) only to explain why *Lorance* did not present a disparate-impact

[10] In relevant part, section 2000e-2(h) is set forth *infra* at 40-41, and section 2000e-2(k) *supra* at 18.

claim. Petrs. C.A. Br. 18, 20. Petitioners did not even make this statutory argument in their petition for certiorari. It debuted in their reply brief, and in the Solicitor General's amicus brief, at the certiorari stage.

Now, having become enamored of sections 2000e-2(h) and (k), petitioners mistakenly rely on them to argue that each use of the list was an independent wrong. Br. 14-16, 18-24, 29, 31, 33-34, 40, 44-45; see U.S. Br. 9, 11, 15; Partnership Br. 2, 5, 10. Neither of these sections addresses accrual or identifies the elements of a disparate-impact claim. Moreover, they cannot be picked apart or read in isolation from the rest of the statute.

Section 2000e-2(k) does not speak to accrual. It sets forth the "[b]urden of proof in disparate impact cases." 42 U.S.C. § 2000e-2(k). The "unlawful employment practice" challenged here is defined by section 2000e-2(a)(2); and when that practice is identified, the accrual provision, section 2000e-5(e)(1), provides that the charge-filing period begins when the "alleged unlawful employment practice occurred." Petitioners confuse what is needed to trigger the limitations period – section 2000e-2(a)(2) – with what is needed to prove the case – section 2000e-2(k). This may explain the heavy reliance by petitioners and their amici on the district court's liability findings when the case now concerns when the limitations period commenced.[11]

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[11] Some of the highlighted facts are incomplete or misleading. The steps Chicago followed compare favorably to the process determined in *Ricci* to produce a valid examination. See 129 S. Ct. at 2678. And Joyce set the cut-off score at a time that Dr. Outtz defended the examination's validity. R. 189, Ex. B. As Joyce explained, with a valid test, a higher score is meaningful.

Beyond that, petitioners read too much into section 2000e-2(k)'s reference to "uses." Br. 20-21; see U.S. Br. 14-15. A statute's language "cannot be interpreted apart from context"; and words should not be viewed in isolation but read in light of the statutory scheme. *Smith v. United States*, 508 U.S. 223, 229 (1993). Section 2000e-2(k) was added after *Wards Cove* to restore *Griggs*' burden-shifting test. That amendment did not address or alter accrual under section 2000e-5(e)(1). In fact, it would be surprising if it did, when neither *Griggs* nor *Wards Cove* involved accrual. And petitioners' contention that the present tense in section 2000e-2(k) is significant for accrual purposes does not fit with the language of the accrual provision itself. Section 2000e-5(e)(1) uses the past tense ("occurred"). See *Morgan*, 536 U.S. at 109 ("occurred" means "the practice took place or happened in the past," so a charge must be filed "*after* the unlawful practice happened").

Pet. App. 20a; Tr. Vol. 16 at 362-77. Joyce rejected Dr. Outtz's lower cut-off score not "arbitrarily" (Pet. Br. 4) but to yield the appropriate size pool. Pet. App. 19a-20a; Tr. Vol. 16 at 362-72. This is what is labeled "administrative convenience." Pet. Br. 11; Pet. App. 34a-35a. But with a valid test, the EEOC approves this. See 29 C.F.R. § 1607.5(H). While the district court later found the cut-off score was not useful (Pet. Br. 3-4), that was in hindsight. As for skewing the test to a minor aspect of the job (*id.* at 11 n.6), ironically Dr. Outtz designed the video to lessen adverse impact. Tr. Vol. 15 at 148-49, 164-67. As we pointed out below (Resp. C.A. Reply Br. 5-6), the district court's ultimate findings do not show that Chicago knew "from the outset" the 89 cut-off score "was statistically meaningless" (Pet. Br. 11 (citing Pet. App. 30a)). Instead, that was "[t]he evidence at trial." Pet. App. 30a. And since the district court's judgment, *Ricci* has limited the ability of an employer that believes a test is valid to refuse to use the results because of disparate impact.

So petitioners and their amici must rewrite section 2000e-2(k). According to petitioners, "'[a]n unlawful employment practice based on disparate impact' occurs each time the employer 'uses a particular employment practice that causes a disparate impact on the basis of race.'" Br. 14 (emphasis omitted). This ignores critical words like "[b]urden of proof" and "established," which make clear that this section describes what is needed to prove a disparate-impact claim, not to file an administrative charge. And it casually inserts the words "occurs each time," when this section has nothing to do with accrual. Petitioners' amici do the same thing. U.S. Br. 9; Partnership Br. 2.

Even assuming section 2000e-2(k) is relevant to accrual, Chicago's only "use" of a practice with disparate impact was the use of the examination results to create the eligibility list. After that, Chicago used the list, not the examination results, to call from the "well qualified" category. There is no evidence, much less a finding, that anyone considered the examination results again.[12] As we explain, petitioners did not prove that use of the list had disparate impact.

As for section 2000e-2(h) (Pet. Br. 15, 23-26, 29-30; U.S. Br. 14-15), that section provides that "it shall not be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that

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[12] Petitioners emphasize (Br. 20-21; see U.S. Br. 16) that our answer admitted Chicago "has used and continues to use results" of the examination in hiring (J.A. 16; see J.A. 22). This is meaningless standing alone. We did not admit that use of the results limited petitioners' employment opportunities within the statutory prohibition. While we used them to hire others, section 2000e-2(a)(2) does not prohibit hiring per se, as we explain above.

such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race" (42 U.S.C. § 2000e-2(h)). This is "a definitional provision" that "delineates which employment practices are illegal and thereby prohibited and which are not." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758 (1976). Thus, it too is irrelevant to accrual. If relevant, it too does not help petitioners. They claim that use of the list was "action upon the results" of the examination. Br. 15, 25-26, 30; see U.S. Br. 15. But "action upon the results" was taken only once here, when Chicago used the results to make the list. Thereafter, eligibility was limited to "well qualified" applicants, pursuant to that "action." Once the list was created, there was no other "action upon the results" of the examination – only use of the list, as Chicago previously determined it would be used.

E. Because Accrual Of Title VII Claims Varies With The Practice, Practices Other Than Discrete Acts, Including Some With Disparate Impact, May Warrant Different Rules.

While accrual should not depend on the method of proof, accrual does "var[y] with the practice." *Morgan*, 536 U.S. at 110. Petitioners and their amici recite this principle (Br. 17; U.S. Br. 12, 27; Partnership Br. 2-4, 6-8, 16-23 & nn. 5, 8), but then ignore it. Indeed, their examples reveal that petitioners' question presented may sweep too broadly.

1. The analogies to other statutes, under which repeated violations trigger a new limitations period, are unnecessary and unilluminating. As we explain, this rule applies under Title VII as well; it simply does not apply here.

Under the FLSA and its amendment, the Equal Pay Act of 1963 (Pet. Br. 16, 33; U.S. Br. 23; Agencies Br. 22-23, 25, 28), a violation occurs anytime an employer fails to "pay" an employee minimum wage for hours worked (29 U.S.C. § 206(a)); an employee fails to "receiv[e]" proper overtime compensation from an employer (*id.* § 207(a)(1)); or an employer "pay[s] wages" to a female employee at a lower rate than a male doing the same work (*id.* § 206(d)(1)). By their terms, these statutes create installment obligations. Each time payment is due but not made, there is a breach and a new limitations period. See *County of Washington v. Gunther*, 452 U.S. 161, 167-81 (1981); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 208 (1977); *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).

The antitrust and copyright examples (Agencies Br. 21-22, 25) are the same. Every sale under an ongoing price-fixing agreement is a violation (see *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)), as is each infringement of "any of the exclusive rights of the copyright owner" (17 U.S.C. § 501(a)) by each copy distributed (see *id.* § 106(4)). Each violation has its own limitations period. These examples stand in contrast to the Title VII claim in this case, now based on subsequent use of a (lawful) list. There was no separate statutory wrong triggering a new charge-filing period in this case.

2. Petitioners' amici also worry about those who may not know immediately that a practice has disparate impact. U.S. Br. 10, 25-26, 31-32; Agencies Br. 3, 11. Assuming that disparate impact (the prima facie case) must be known before filing EEOC

charges, this case – where Chicago admitted and petitioners knew right away that the examination and list had disparate impact – does not raise that concern. Nor do we urge a one-size-fits-all accrual rule for disparate-impact claims. Such claims, like disparate-treatment claims, come in different shapes and sizes, and thus may accrue at different times.

For example, adverse impact may not be immediately manifest. In *Davidson v. Board of Governors*, 920 F.2d 441 (7th Cir. 1990), a professor claimed that a university's salary scheme, which required negotiation before hiring and granted raises only upon presentment of formal offers by other employers – had unlawful adverse impact based on age (a claim available at the time), although that was not apparent when he was hired. See *id.* at 442-44. The court noted "[t]here are two ways to handle this problem" – postpone accrual until the disparate impact occurs or "hold that although the claim arises when the [challenged] practice . . . is first made applicable to" the complainant, "the statute of limitations will be tolled until he has had a reasonable opportunity to determine whether he has a claim." *Id.* at 445. The court concluded that the second option, "which tolls the statute of limitations in appropriate cases but does not postpone the accrual of the plaintiff's cause of action is superior" for cases in which the plaintiff cannot determine, even with due diligence, whether the practice is unlawful. *Ibid.* See also Merrick T. Rossein, *Employment Discrimination Law & Litigation* § 11:10 (2008) (example that fire department requires applicants with children to demonstrate adequate childcare arrangements; claim by women rejected at higher rate than men not statistically significant at first because few women apply); Agencies Br. 11-12. But, when the adverse impact "is

known from the start," the claim accrues right away. *Davidson*, 920 F.2d at 444.

3. When the disparate impact is caused by a policy, rather than a list, it may be difficult to tell when the impact of a policy is felt – because employees do not fall within the policy at that time, do not yet work for the employer, or other reasons. *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), may be such a case. There, the employer provided insurance benefits to children only if they lived with their employee-parent; plaintiffs claimed this policy adversely affected men, who, if divorced, are less likely to have full-time custody. See *id.* at 794-800. Beavers sued long after the policy was adopted but at a time when his children "continued to be ineligible" for coverage (*id.* at 794); the court held this timely as "the direct result of [an] on-going policy actively maintained by" the employer (*id.* at 799). The rationale (pre-*Morgan*, as a continuing violation) is wrong, and it is "arguable" (Pet. App. 5a) whether the result is. Nonetheless, it may be possible to identify different times at which the unlawful practice in such cases occurs – when the employee is hired, has children, separates from his partner, or loses custody – or equitable tolling may be warranted. The same may be true of various other hypotheticals. Pet. Br. 45 n.24; Partnership Br. 17-18 n.6. But under petitioners' rule, Beavers could challenge the policy more than 300 days after it was applied to him to deny a claim for medical expenses, so long as the employer had not changed the policy. There is no justification for that accrual rule. Moreover, the impact of an eligibility list is different from the impact of an open-ended employment policy. All applicants who will ever be affected by such a list feel the impact, and the full impact, the moment the list

is adopted and they are notified that it adversely affects them. It does not matter whether the limitations period expires before vacancies are filled. Pet. Br. 17, 42-43. As we explain, hiring is not the statutory violation here; and anyone who wanted to challenge the list could have, and should have, done so upon its adoption. Petitioners cannot challenge use of the list, for no impact occurred then.

4. Another hypothetical involves a facially discriminatory policy (Agencies Br. 26); as we explain above, that accrual rule does not apply here.[13] If an employer adopted a policy against hiring women, the *Bazemore* rule may apply each time it denies a woman a job.

In short, while these examples demonstrate that on different facts, a claim, even a disparate-impact claim, may occur at different times, they do not obscure that only one discrete act occurred here, when Chicago used the results of the examination to create a hiring pool that excluded petitioners.

F. Policy Concerns Support Finding Only One Discrete Act Here, Not A Recurring Present Violation.

The policies underlying accrual and repose support applying the accrual rule for discrete acts here, and rejecting petitioners' recurring present-violation theory.

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[13] Rather cryptically, petitioners contend that "the court of appeals' analysis is inconsistent with the premise that a facially discriminatory practice can be challenged at any time." Br. 40 n.20 (citation omitted). No such practice was alleged or proved in this case, and the eligibility list is not facially discriminatory in any event.

1. Petitioners (Br. 44, 45-46) and their amici (Agencies Br. 2, 6-9, 13) urge a "clear" accrual rule, particularly because the process Congress created is designed to be initiated without assistance of counsel. We could not agree more. Under our rule, applicants who are informed they would "not likely" be called because of their ranking on an eligibility list (*e.g.*, J.A. 35) should file charges if they believe the ranking may be unlawful. That is as clear as rules get. And courts considering the consequences of disparate-treatment have had no trouble determining that these do not trigger another claim.

Petitioners' theory would require applicants considering a challenge to their placement on an eligibility list to inquire continuously whether others are being called. Unlike the list's adoption, applicants were not personally informed when the list was used to hire others; nor was there a public announcement about each use. Moreover, when an employer decides to stop using a list, an applicant who had been waiting to challenge it (whether to be certain he was not going to be hired or just because he could) might miss that charging period, unless he somehow found out what would be the last use. All this makes petitioners' rule harder to apply, especially for laypersons.

2. While disparate-impact claims require no proof of intent, that does not mean there should be no concern for loss of evidence over time. Pet. Br. 47-48; U.S. Br. 10, 30-31; Agencies Br. 3-5, 17; Partnership Br. 16 n.4. The plantiff's prima facie case is typically statistical (see generally *Meacham*, 128 S. Ct. at 2405; *Griggs*, 401 U.S. at 431-32), but not all the relevant evidence is "wholly objective" (Agencies Br. 18). If the plaintiff establishes a prima facie case – or, as here, the employer admits it – the employer must

prove the practice was job-related, valid, and consistent with business necessity. See 42 U.S.C. § 2000e-2(k)(1)(A)(i). That may depend on testimony by those who made decisions about the practice. Thereafter, the plaintiff must prove that less discriminatory alternatives exist (see 42 U.S.C. § 2000e-2(k)(1)(A)(ii)) and can rely on testimony of the defendant's decisionmakers about any alternatives that were considered. Memories on these issues, as on intent, can fade; and decisionmakers may be unavailable to testify for a variety of reasons.

This case demonstrates such concerns. The 2004 liability trial largely focused on Chicago's defenses. Joyce – DOP's Deputy Commissioner when the 1995 test was developed and scored, and applicants classified into three categories – testified these were job-related and consistent with business necessity. Tr. Vol. 16 at 325-91. At least twice in response to questions by petitioners' counsel, Joyce could not recall his calculations from nine years earlier. *Id.* at 375, 383-84.[14] Dr. Outtz testified about creating the

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[14] Joyce testified:

> Q. You are aware, sir, that the manner in which you did decide to use it; that is, by setting a cut score of 89, caused severe adverse impact, are you not?
>
> A. It has adverse impact, but less than had we used it in straight rank order.
>
> Q. Did you ever calculate statistically how much less?
>
> A. As I sit here today, nine years later, I don't recall. I believe I would have.
>
> Tr. Vol. 16 at 375.
>
> Q. Did you ever calculate what difference in adverse impact there would be from choosing at random between 89 and 98 and choosing in strict rank order?
>
> * * * *

examination and his recommendations to Chicago (Tr. Vol. 15 at 71-190; Vol. 16 at 189-322), and other City employees testified (Tr. Vols. 15-22).

Even assuming that disparate-impact claims "typically" do not turn on the "testimony of fact witnesses" (Pet. Br. 47), and so memories of decisionmakers "are not typically essential to the[ir] resolution" (U.S. Br. 30), that was not so here. The district court's liability decision reveals that the testimony of Joyce and Dr. Outtz was critical to evaluating Chicago's defenses. Pet. App. 16a-23a. And petitioners relied on testimony from Chicago officials in rebuttal. *Id.* at 41a-42a.

Moreover, records about an examination's impact and validity (Pet. Br. 48; U.S. Br. 30) are no substitute for prompt filing. First, EEOC regulations counsel that this information "should" be kept on hand (29 C.F.R. §§ 1607.4, 1607.5, 1607.15), but do not mandate it. Beyond that, recordkeeping does not mean records are never lost or destroyed through inadvertence or natural disaster. Second, evidence besides records, like testimony, is needed, particularly for defenses. As for the observation that we have not claimed petitioners' delay affected this case (U.S. Br. 30), the limitations defense operates whenever no timely charge is filed, regardless of actual prejudice to the defendant.

A. I computed what adverse impact there would be using it in straight rank order, and I computed what adverse impact figure would be at 89. So while I didn't do it in the way you characterized it, I did do those two steps.

Q. And what was the difference?

A. I don't remember as I sit here nine years later.

Id. at 383-84.

3. Laches (U.S. Br. 29-30; Partnership Br. 15-16) does not adequately curb petitioners' theory.[15] Although it is a defense under Title VII (see *Morgan*, 536 U.S. at 121), "Congress plainly did not think that laches was sufficient," for it took a "diametrically different approach" by creating a short EEOC charge-filing period (*Ledbetter*, 550 U.S. at 632). The short period is intended to promote certainty in the workplace and eliminate stale claims, not merely ensure that employers will not be prejudiced in presenting defenses. Plus, a fact-intensive laches defense poses the same problems as litigating stale claims.[16]

4. Challenges to eligibility lists anytime between their adoption and retirement present other problems as well. They "expose employers to a virtually open-ended period of liability"; "create substantial uncertainty" about "important staffing decisions based upon the list"; and call "into question an organizational structure" in place for years, upsetting reliance interests of third parties. *Cox*, 230 F.3d at 205 (citations omitted). See Brief of *Amici Curiae* the City of New York, *et al.*, in Support of Respondent. Hiring and promotional tests "create legitimate expectations on the part of" test-takers. *Ricci*, 129 S. Ct. at 2676. "[A]llowing a facially neutral" practice, like the list here, "to be challenged, and entitlements under it to be altered, many years after its adoption would

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[15] Petitioners' amici refer to other "equitable defenses, including estoppel . . . and equitable tolling." Partnership Br. 15. Unlike laches, these are not affirmative defenses; they are doctrines a plaintiff may invoke against a statute of limitations defense.

[16] The Solicitor General recognized as much in an amicus brief in *Ledbetter*. *Ledbetter* U.S. Br. 21-22.

disrupt those valid reliance interests that" the limitations period "was meant to protect." *Lorance*, 490 U.S. at 912. On petitioners' theory, vast numbers of plaintiffs (6,000 here) may stand idly by as others are called, and file charges years later. If they seek hiring as a remedy, that will frequently require firing the person who was hired.

5. Petitioners' amici posit that our rule could "increase the volume of charges filed, burdening already overtaxed" agencies. Agencies Br. 14; see *id.* at 2, 6, 13-16; U.S. Br. 11, 33. This gets the matter exactly backwards. Under our rule, petitioners' claim accrued, and charges should have been filed, after the list's adoption and announcement, and only then. On petitioners' theory, charges also could be filed every time "well qualified" applicants were called – or twelve times total. If any rule would be burdensome, it is petitioners'.

6. There is no sense in which a charge filed to challenge adoption of a list that immediately excludes applicants from competing to be hired is premature. Pet. Br. 43 n.23, 48-49; U.S. Br. 10-11, 32-22; Agencies Br. 3. Those applicants have suffered "practical harm." Pet. Br. 49, 50. Although some premature charges might be filed, our rule would not encourage them. Moreover, premature charges should be expected in a procedure designed for laypersons and are preferable to tardy ones. If a complainant files too early, at least the EEOC is aware of the charge and can advise on the best course. This serves the purposes of getting the EEOC involved and resolving as many claims as possible before they reach the courts.

7. Petitioners contend "little incentive" exists to file a charge until a list has been "used" (Br. 46), but never explain why. Nor do they explain why this is a

reason to delay accrual past the list's first use. It therefore does not reach this case, where petitioners did not file charges until five months after the second use. And, as we explain above, whether an employer ever uses a list does not affect accrual, because an applicant can be unlawfully excluded even if nobody else is hired. That might mean an applicant has no real damages but does not delay accrual; and injunctive relief may be available. Title VII has a "prophylactic" objective (*Kolstad*, 527 U.S. at 545), intended to "bring employment discrimination to an end" (*Ford*, 458 U.S. at 228).

8. In the next breath, petitioners (Br. 47) and their amici (U.S. Br. 10, 29; Partnership Br. 16) contend that applicants for employment have little "incentive" to delay filing charges. Those who delay may lose backpay or evidence, or face a laches defense. Worse still, delay is inconsistent with Title VII's objective. Those discriminated against "want jobs, not lawsuits." *Ford*, 458 U.S. at 230. Here, Chicago called from the "well qualified" category for five years. If individuals can wait five years plus 300 days to file a charge, there may be little chance of being hired, especially for strenuous jobs, by the time the case is resolved. Even here, where petitioners did not wait five years, petitioners (R. 416 at 3) and the district court (R. 425 at 5) acknowledged that the hiring relief might never be realized.

Delay also hinders the multi-step enforcement procedure Congress created for Title VII. Waiting to initiate the EEOC's investigation and conciliation efforts makes it less likely they will bear fruit. The investigation could be hindered for the same reasons as a lawsuit – time erodes evidence, even on disparate-impact claims. So while "filing a lawsuit might

tend to deter efforts at conciliation" (*Ricks*, 449 U.S. at 260 n.11 (citation omitted)) or voluntary compliance (Pet. Br. 46; U.S. Br. 31), or may poison the employer-employee relationship (U.S. Br. 32-33; Partnership Br. 3, 12-15), delay is not the superior option. Prompt action is the "'natural effec[t] of the choice Congress has made'" under Title VII by "explicitly requiring that the limitations period commence with the date of the alleged unlawful employment practice." *Ricks*, 449 U.S. at 260 n.11 (quoting *Johnson*, 421 U.S. at 461).

And regardless of incentives, petitioners did delay; and under their rule, a claimant could delay much longer. Incentives are no substitute for a firm statute of limitations, which puts complainants on notice exactly when charges must be filed, and gives employers repose after that.

9. Petitioners and their amici impugn this repose as an "immunity." Br. 45-46; see *id.* at 30; U.S. Br. 10, 18, 31; Partnership Br. 4, 23-29. But the balance between enforcement and repose is not unique to Title VII; all limitations periods operate that way, and anyone who fails to file timely forgos his claim. At some point, even the most meritorious of claims must be put to bed. There is nothing "odd" (Pet. Br. 43), "absurd" (*id.* at 41), or "irrational" (Partnership Br. 3) about that. Moreover, the repose extends only to that time-barred challenge. "[A]n employer [has no] legitimate interest in repose so long as it continues to engage in a practice prohibited by Title VII." Agencies Br. 18.

Less dramatically, our rule is said to allow employers to adopt but not use a practice for 300 days, hoping no timely challenge will come. Pet. Br. 41-42, 46; Partnership Br. 3. When an employer needs to

hire, and expends time and resources to create and administer a test, such games cannot be played. And they would be irresponsible for public safety jobs. So is using a stale list to avoid another claim. Pet. Br. 46; U.S. Br. 31. Regardless, those who believe themselves affected by an unlawful practice can and should file charges upon its adoption. That will serve everybody's interests.

10. Finally, *Ricci* supports bringing and resolving challenges to eligibility examinations as early as possible. There, the Court limited a public employer's ability to stop making decisions based on a test with disparate impact. Test results can be abandoned only if there is a "strong basis in evidence." 129 S. Ct. at 2676. Thus, the complaint that our rule "allow[s] an employer to continue using an unlawful selection device indefinitely" (U.S. Br. 10) is not properly laid on us. Had petitioners promptly filed charges, the examination's lawfulness could have been resolved earlier; and even under *Ricci*, findings like the district court's would have allowed (indeed, required) Chicago to take the list down.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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ARTHUR L. LEWIS, JR., *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

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INTRODUCTION

This case presents a narrowly focused dispute. In petitioners' view, when an employer repeatedly uses a non-job-related hiring practice that disproportionately excludes African Americans, each use violates Title VII's disparate-impact prohibition and therefore triggers a new deadline to file charges with the EEOC. In the City's view, if an employer first adopts an eligibility list and announces that it intends to use that list for subsequent hiring, the only actionable liability arises at the point of the list's adoption and announcement.

There are many complex questions about the operation of Title VII, but this is not one of them. The plain text of Title VII's disparate-impact provisions resolves this dispute in petitioners' favor. The City "use[d]" its practice of hiring only applicants who scored 89 or above on a 1995 exam to fill ten entry-level firefighter classes, and a portion of an eleventh class, over a six-year period. 42 U.S.C. § 2000e-2(k)(1)(A); *see also id.* § 2000e-2(a)(2), (h). Each of those uses "cause[d] a disparate impact" on petitioners, a class of African Americans who passed the test but scored below the 89 cut-off score. *Id.* § 2000e-2(k)(1)(A). And as the district court found (and no one now challenges), the cut-off score was not job-related. Petitioners were as qualified for firefighter jobs as those with scores of 89 or above. Each use of the City's hiring practice therefore independently violated Title VII's disparate-impact prohibition and triggered a new charge-filing period.

The City's contrary arguments are unconvincing. First, the City misconstrues the statutory text. The

City claims that the disproportionate exclusion of African Americans from each firefighter class was merely the "neutral" consequence of the adoption and announcement of the eligibility list. Petitioners agree that the initial adoption of the list violated Title VII. But an independent violation also occurred each time the City used its non-job-related practice to select applicants from a disproportionately white pool to fill firefighter vacancies. Each such use was a discriminatory denial of jobs to qualified applicants on account of race—one of the core injuries that Congress intended Title VII to prohibit.

Second, the City objects that the accrual rule for disparate-impact cases should not be more generous than the rule this Court has applied in disparate-treatment cases. But the rule compelled by Title VII's text is not more or less generous in either type of case. Rather, in both contexts, timeliness is governed by application of this Court's general Title VII accrual principle: A Title VII claim accrues each time an employer's actions meet all the required elements of a particular type of violation. Here, that occurred each time the City used its unlawful cut-off score to hire entry-level firefighter candidates.

The City relies on *United Air Lines, Inc. v. Evans* to argue that its discriminatory cut-off score was "merely an unfortunate event in history which has no present legal consequences." 431 U.S. 553, 558 (1977). But *Evans* was a disparate-treatment case. Although the adoption of an eligibility list based on an unlawful cut-off score was indeed an "unfortunate event," the City's use of this cut-off score in multiple rounds of hiring directly and repeatedly violated the disparate-*impact* provisions of Title VII. Like the

high school diploma requirement in *Griggs v. Duke Power Co.*, which was adopted almost ten years before Title VII was enacted, the City's non-job-related hiring practice was subject to challenge each time the City used it in a manner that caused a disparate impact. *See* 401 U.S. 424, 427 (1971).

Third, the City argues that the accrual rule compelled by Title VII's text will expose employers to open-ended liability. But the City could have achieved repose here simply by dropping its admittedly discriminatory cut-off score, instead of using it on multiple occasions. Moreover, employees have every incentive to file prompt charges because they may challenge only those uses that occur within the limitations period. The City's rule, by contrast, compels individuals to file charges before they can determine whether an employment practice has caused or will cause any practical harm. This would burden employees, employers, government enforcement agencies, and the courts with unnecessary proceedings.

ARGUMENT

I. The City's arguments are contrary to the plain meaning of Title VII.

Section 706(e) of Title VII operates as a statute of limitations. 42 U.S.C. § 2000e-5(e)(1). It requires that a lawsuit challenging employment discrimination be preceded by a charge timely filed with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." *Id.*

Where the challenged practice violates Title VII's disparate-impact prohibition, the violation occurs, and thus a new charge-filing period begins, each

time the requirements of § 703(k) are met—that is, each time an employer "uses a particular employment practice that causes a disparate impact," and the employer is unable to demonstrate that the practice is job-related. *Id.* § 2000e-2(k)(1)(A); Pet. Br. 18-19. This plain-meaning interpretation of § 703(k) is supported by other provisions of Title VII, including § 703(a)(2) and § 703(h). 42 U.S.C. § 2000e-2(a)(2), (h); Pet. Br. 23-27.

Applying Title VII's disparate-impact provisions to this case, a new charge-filing period commenced each time the City filled firefighter vacancies by using its practice of hiring only applicants whose exam results exceeded a statistically meaningless cut-off score that disproportionately excluded African Americans and bore no relationship to job performance. Pet. Br. 23-27; Pet. App. 31a-35a.[1]

The City raises a series of objections to petitioners' statutory analysis. These arguments all collapse under scrutiny.

A. Section 703(k) is the principal disparate-impact provision and is directly relevant to the timeliness of claims.

The City acknowledges that § 703(k) "describes what is needed to prove a disparate-impact claim," Resp. Br. 40, but contends nevertheless that this

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[1] Although the City hired paramedics and military veterans with scores below the 89 cut-off score, petitioners follow the convention used by the parties and courts below and refer to the City's practice as hiring "only" applicants with scores of 89 or above to fill ten classes of firefighter candidates, and a portion of an eleventh class, from May 1996 through November 2002. Pet. Br. 6 n.1.

provision is irrelevant to "what is needed to trigger the limitations period." *Id.* at 38. The City is mistaken.

A Title VII charge must be filed "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). What constitutes an "alleged unlawful employment practice" and when it "occurred" can only be determined by reference to the substantive provisions defining the elements of a Title VII violation. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624, 628-29 (2007); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110-13 (2002); Pet. Br. 17-19.

One of the principal substantive provisions defining the elements of a disparate-impact violation is § 703(k), which this Court has recognized as "the disparate-impact statute." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009). In enacting § 703(k) as part of the Civil Rights Act of 1991, Congress stated that the purposes of this subsection are "to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits." Pub. L. No. 102-166, § 3(3), 105 Stat. 1071, 1071; *see also Ricci*, 129 S. Ct. at 2673. It is therefore both appropriate and necessary to look to the text of § 703(k) to determine when Title VII's charge-filing period begins to run in a disparate-impact case.[2]

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[2] Section 703(k) is titled "Burden of proof in disparate impact cases." 42 U.S.C. § 2000e-2(k). Far from undercutting the significance of § 703(k) for claim accrual, as the City claims, Resp. Br. 38, the title highlights the importance of this provision. It is well settled that "the burden of proof is an essential

When § 703(k) is properly interpreted and the statute is read as a whole, the City's argument that § 703(a)(2) is the sole pertinent provision for determining disparate-impact claim accrual, Resp. Br. 38, falls apart. Sections 703(k) and 703(a)(2)—as well as § 703(h), which forbids "action upon the results" of an employment test that is "used to discriminate"—are all complementary. 42 U.S.C. § 2000e-2(h); Pet. Br. 23-26; U.S. Br. 13-15.[3] When an employer "uses" a hiring practice with a disparate racial impact and thus commits a violation under § 703(k), or when it takes "action upon the results" of an employment test contrary to § 703(h), its actions also violate § 703(a)(2). Such uses "limit applicants for employment" in a manner that "deprive[s] or tend[s] to deprive" them of specific "employment opportunities." 42 U.S.C. § 2000e-2(a)(2).

Prior to the enactment of § 703(k) in 1991, § 703(a)(2) and § 703(h) provided the statutory basis

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element of the claim itself . . . ." *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 21 (2000); *see also Am. Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994) (stating that the burden of proof is "a part of the very substance of [the plaintiff's] claim and cannot be considered a mere incident of a form of procedure" (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942))). In any event, "the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947); *accord Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004).

[3] The City's concession that § 703(h) "is 'a definitional provision' that 'delineates which employment practices are illegal and thereby prohibited and which are not,'" Resp. Br. 41 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758 (1976)), is fatal to its argument that this provision, like § 703(k), is "irrelevant to accrual." *Id.*

for disparate-impact liability. *See, e.g.*, *Griggs*, 401 U.S. at 426 n.1, 433-36. But, as this Court has observed, § 703(k) "codif[ied]" an "express prohibition on policies or practices that produce a disparate impact." *Ricci*, 129 S. Ct. at 2672. The City's attempt to ignore a recent, express statutory text—and its consequent failure to harmonize all of Title VII's operative disparate-impact provisions—would nullify congressional intent and should be rejected. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 143-44 (2000).[4]

B. The City repeatedly *used* an unlawful hiring practice, and each use triggered a new claim under § 703(k).

1. The City alternatively argues that, even if § 703(k) is relevant, petitioners' EEOC charges were untimely because the City "use[d]" a practice that "cause[d] a disparate impact" only once: when it

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[4] Contrary to the City's contention, Resp. Br. 12, 37-38, petitioners have relied on the plain meaning of Title VII throughout this litigation. The petition for certiorari invoked § 703(k), Pet. 26, and the City responded without claiming that it did not have fair notice, Supp. BIO 8-10. In the district court and court of appeals, petitioners argued—consistent with the statutory interpretation advanced in this Court—that each use of the City's hiring practice was a "fresh violation [of Title VII] for purposes of the statute of limitations." R. 74 at 7 (Pls.' Mem. Opp. Summ. J.); *see also, e.g.*, R. 302 at 2 (Pls.' Mem. Regarding Proposed Questions for Interlocutory Appeal); Pet. C.A. Br. 22 ("[E]very employment action taken pursuant to a *Griggs*-prohibited policy is a fresh violation of Title VII . . . ."). Even if petitioners' reasoning is more "pellucidly articulate[d]" in this Court, however, "parties are not limited to the precise arguments they made below." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)).

adopted an eligibility list that employed a non-job-related cut-off score to sort applicants who passed the 1995 exam into "well qualified" and "qualified" categories, and then announced that it would use this list for future hiring. 42 U.S.C. § 2000e-2(k)(1)(A); Resp. Br. 8-9, 11, 23-25, 40. After that, the City claims that it simply "used the list . . . to call from the 'well qualified' category." Resp. Br. 40. According to the City, that category was "facially neutral, and the list was used in a neutral manner." *Id.* at 31.[5]

Under the statute's disparate-impact provisions, however, employers are liable for "practices, procedures, or tests neutral on their face, and even neutral in terms of intent." *Griggs*, 401 U.S. at 430; *see also Ricci*, 129 S. Ct. 2672-73; *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). Section 703(k) prohibits employers from "us[ing]" a non-job-related hiring practice that has a disparate racial impact, regardless of whether such a use is a consequence—neutral or otherwise—of earlier violations. 42 U.S.C. § 2000e-2(k)(1)(A). Contrary to the City's contention, Resp. Br. 36-37, consequences are the very touchstone of a disparate-impact violation. *Griggs*, 401 U.S. at 432.

Moreover, the City did not use its eligibility list in "a neutral manner." Resp. Br. 31. It is entirely beside the point that the City applied the label "well

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[5] The City disavows, Resp. Br. 33, the court of appeals' reasoning that the City's adoption of its eligibility list was an "intervening neutral act." Pet. App. 4a-5a. As discussed in petitioners' opening brief, the court of appeals' analysis is just as flawed as the City's alternative formulation. Pet. Br. 40-43.

qualified" to the category of applicants who scored 89 or above. That category was nothing more than a direct translation of the discriminatory cut-off score. The accurate label would have been the "no more qualified" group. The City's attempt, Resp. Br. 11-12, to distinguish between use of this cut-off score to create an eligibility list, on the one hand, and the actual use of the list, on the other hand, is mere semantics. U.S. Br. 16; Pet. Br. 40-43.

If the City had simply used the discriminatory cut-off score eleven times, without announcing that it had adopted an "eligibility list," each hiring round plainly would have violated Title VII's disparate-impact provisions. On each occasion, the City would have had to consult raw test scores for all 22,000 applicants who passed the 1995 exam—each time selecting at random a sufficient number of applicants with scores of 89 or above to fill entry-level firefighter jobs. Thus, each of those hiring rounds necessarily would have involved the "use[ ]" of a cut-off score that, based on the district court's unappealed findings, "cause[d]" an unjustified "disparate impact" on African American applicants. 42 U.S.C. § 2000e-2(k)(1)(A); Pet. App. 15a, 42a-43a.

The City did not change the result in any way, or drastically reduce its liability, by adopting and announcing an eligibility list. The difference between a hiring process that relies on an eligibility list and one that does not is one of form, not substance. By using the discriminatory cut-off score to create an eligibility list, the City avoided using the entire pool of applicants to select at random, in each round of hiring, a sufficient number of applicants to fill a firefighter class.

Whether it used an eligibility list or not, the City relied, in each round of hiring, on a non-job-related cut-off score that it knew had a disparate impact on African American applicants. Either way, the end result was the same. In each round of hiring, the City filled positions by randomly selecting from a pool of disproportionately white applicants and thus disproportionately excluded African Americans who were no less qualified. *See* Pet. App. 60a.[6] And either way, the City rejected the readily available alternative of random selection from the entire pool of test-passers—an alternative that would have avoided all harm to petitioners caused by the discriminatory cut-off score. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).[7]

2. According to the City, it is "precisely because using the list limited petitioners' employment opportunities 'in the exact same way' as 'us[ing] the raw test results'" that "later use of the list had no disparate impact at all." Resp. Br. 35 (quoting U.S. Br.

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[6] Notwithstanding its concession that the ruling on liability is "unchallenged," Resp. Br. 32, the City tries to undercut the district court's finding that the cut-off score bore no relationship to job performance. Pet. App. 30a. But the City's assertion that applicants eventually hired from the "qualified" category "required remedial assistance," Resp. Br. 6, was expressly rejected by the district court. It found that the anecdotal evidence presented by the City on this point was "not convincing." Pet. App. 38a-40a & n.7.

[7] In fact, the City subsequently used this alternative from 2002 to 2007 to hire numerous applicants with scores between 65 and 88, after it had exhausted the pool of applicants with scores at or above 89. BIO 1 & n.1. There was no evidence that firefighters who scored between 65 and 88 performed worse on the job than those who scored 89 or above. Pet. App. 36a-37a.

16). But the plain language of the statutory text forecloses the City's argument. Section 703(k) does not exempt "uses" of a non-job-related practice that cause a disparate impact if they limit employment opportunities in the "same way" as prior Title VII violations. 42 U.S.C. § 2000e-2(k)(1)(A); Pet. Br. 29-30; U.S. Br. 24. Moreover, § 703(h) expressly states that a discriminatory "test," "its administration," and "action upon the results" can each be violations of Title VII, even though such violations necessarily will be related and may yield the same disparate impact. 42 U.S.C. § 2000e-2(h).

There is also a larger point here. Even the City acknowledges that its adoption and announcement of the list were merely "the foundation for later hiring eligibility." Resp. Br. 26. But when the eligibility list was announced, no hiring decisions had been made. The adverse impact on petitioners caused by the City's announcement that it would use the unlawful cut-off score, and the list that embodied that score, was dwarfed by the new and distinct harm caused when the City actually put its hiring practice into operation. It was the City's repeated uses of a non-job-related cut-off score—whether or not it was in list form—that resulted in the award of jobs to a group of applicants that disproportionately excluded African Americans.

To be clear, petitioners agree with the City and the United States that the City's adoption and announcement of the list independently violated Title VII, and therefore petitioners' charges would have been timely if filed within 300 days of those actions. *See* Resp. Br. 24, 30; U.S. Br. 23. But the remedy in such an action would have been an order preventing

the City from using the cut-off score and eligibility list. *See, e.g., Vulcan Pioneers v. N.J. Dep't of Civil Serv.*, 832 F.2d 811, 816-17 (3d Cir. 1987). In fact, the claim would have been that any future uses would be unlawful. As the district court found, those uses were unlawful, and every time the City filled firefighter vacancies on that basis, it violated Title VII and started a new charge-filing period.

3. The City argues that the only disparate impact on petitioners was caused when it announced the eligibility list, because petitioners knew at that point what the future consequences were likely to be. Resp. Br. 10-11, 13, 27-29, 46. However, a disparate-impact claim is not triggered by the mere fact that an employer places job applicants or employees on notice of a discriminatory policy and its potential future impact on them. Section 703(k) does not make notice an element—let alone the defining element—of a disparate-impact violation. 42 U.S.C. § 2000e-2(k)(1)(A). This Court has stated that notice is insufficient by itself to trigger accrual of Title VII claims. *See Morgan*, 536 U.S. at 113; *see also Ledbetter*, 550 U.S. at 636.[8] Regardless of when they were notified, petitioners were entitled to take the full limitations period after each use of the City's discriminatory hiring practice to develop and file their EEOC charges.

The City attempts to bolster its analysis by arguing, without citation, that a job applicant's Title VII claim accrues when he or she is "rejected for em-

[8] Lack of knowledge could toll a statute of limitations after a claim accrues; but petitioners do not assert in this Court that the charge filing period should be tolled. Pet. Br. 13 n.8.

ployment" and "does not depend on whether an employer hires others." Resp. Br. 26; *see also id.* at 11. This assertion is incorrect. First, petitioners were rejected for employment each time the City passed them over by filling entry-level firefighter positions from a pool of disproportionately white applicants with no greater qualifications. Pet. Br. 20. Second, a disparate-impact violation is not established solely by reference to the impact on job applicants or employees who claim to have been injured. Determining whether a practice "causes a disparate impact," 42 U.S.C. § 2000e-2(k)(1)(A), obviously requires comparison to similarly situated individuals who benefit from the practice. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988); Pet. Br. 21-22.

C. The City's hiring practice caused a disparate impact in each round of hiring.

After arguing that its eleven rounds of hiring were not independently actionable, the City switches gears. Even if each round could "be charged as a new violation" of Title VII, Resp. Br. 33, the City claims that petitioners "never proved, or even attempted to prove," that each of these uses caused a disparate impact. *Id.* at 32; *see also id.* at 40.

This argument is factually incorrect. Testimony from one of petitioners' experts demonstrated that in each of the eleven rounds of hiring, the City's use of the discriminatory cut-off score resulted in the selection of African American applicants at rates far lower than the percentage they represented in the pool of test-passers—that is, the pool of applicants who scored 65 or above and thus proved themselves

fully qualified for the job. R. 366 at 1-4 & attach. B; Pet. Br. 22; Pet. App. 15a-16a.

This evidence was uncontested. The City's expert agreed with and "adopted" the calculations by petitioners' expert of the shortfall number of African American applicants who would have been hired in each class but for the City's use of its discriminatory hiring practice. R. 371 at 6.[9]

II. The City misconstrues this Court's precedents.

Notwithstanding the City's contentions, this Court's prior decisions addressing the timeliness of Title VII claims neither hold nor suggest anything inconsistent with the plain meaning of the statute's disparate-impact provisions. All the cases are consistent with the conclusion that each use of a non-job-related practice that causes a disparate impact violates the statute and triggers a new charge-filing period.

A. Each new Title VII violation begins a new charge-filing period.

The Court's precedents establish a simple accrual principle applicable to all Title VII cases: A claim accrues, and thus a new charge-filing period starts, each time an employer's actions satisfy the required

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[9] In any event, petitioners were not required to demonstrate that the City's hiring practice had an adverse impact in each particular hiring round that differed in kind or degree from the adverse impact of a prior violation. *Cf. Dothard*, 433 U.S. at 329. Section 703(k) prohibits an employer from using "a particular employment practice that causes a disparate impact," 42 U.S.C. § 2000e-2(k)(1)(A), and this is what the City did. *See* U.S. Br. 12.

elements of a particular type of Title VII violation. *See, e.g., Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1997) (holding that timeliness turns on "whether any present *violation* exist[ed]" within the charge-filing period (quoting *Evans*, 431 U.S. at 558)); Pet. Br. 34-35.

Applying this principle does not require an assessment of whether disparate-treatment violations involve "greater moral culpability" than disparate-impact violations, as the City contends. Resp. Br. 37. Rather, in both disparate-treatment and disparate-impact cases, the charge-filing period corresponds to the statutorily-defined elements of the particular violation. U.S. Br. 27; Pet. Br. 34-37.[10]

In a disparate-treatment case—where the defining element is intent—the charge-filing period runs from the date of each intentionally discriminatory practice. Pet. Br. 34-40. This is true of both one-time employment transactions and repeated uses of general policies. As to the latter, if the policy is repeatedly implemented under circumstances that demonstrate present discriminatory intent, then each use is a new violation. *See Ledbetter*, 550 U.S. at 634; *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 912 n.5 (1989); *Bazemore v. Friday*, 478 U.S. 385, 386-87 (1986) (per curiam); *id.* at 394-96 (Brennan, J., concurring). But if the practice is later used under circumstances where no discriminatory motive is

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[10] Because the same principle determines the timeliness of all Title VII claims, there is no need for the Court to depart from the plain meaning of the statute's disparate-impact provisions in order to "avoid" purported "constitutional problems" that the City asserts but never explains. Resp. Br. 36 n.9.

involved, there is no new violation. *See Ledbetter*, 550 U.S. at 625-26.

The same principle governs disparate-impact cases. In such cases—where discriminatory intent is not a required element—a claim accrues whenever the employer uses a non-job-related employment practice that causes a disparate impact. *See* 42 U.S.C. § 2000e-2(k)(1)(A); *Lorance*, 490 U.S. at 908; Pet. Br. 31, 36-37. If a plaintiff proves that an employer repeatedly used an employment practice that caused a disparate impact on a protected group, then he or she is in the same position as a plaintiff in a disparate-treatment case who proves that a subsequent use of a policy was motivated by present discriminatory intent. In both cases, the charge-filing period starts running again with each use. *See Ledbetter*, 550 U.S. at 636 ("[A] freestanding violation may always be charged within its own charge-filing period regardless of its connection to other violations.").

Thus, the City's response that no facially discriminatory practice was alleged or proved here, Resp. Br. 45 n.13, misses the point. The critical issue is whether the employer's conduct satisfied, within the charge-filing period, the elements of the particular type of Title VII violation alleged by the plaintiffs. A facially discriminatory system can consequently be challenged each time it is applied because the element of discriminatory intent is satisfied on each occasion. *See Ledbetter*, 550 U.S. at 634. Similarly, a practice that has an unjustified disparate impact can be challenged each time it is used—as long as the elements of a disparate-impact violation are satisfied on each occasion, as they were here

each time the City used its discriminatory hiring practice.

Proper application of the Court's basic accrual principle undermines the City's reliance on *Ricks*, 250 U.S. 449 (1980), and *Chardon v. Fernandez*, 454 U.S. 6 (1981) (per curiam). In both cases, employees challenged their termination as intentionally discriminatory. But the actual end of employment, which was the only event within the charge-filing period, was merely a consequence of an earlier decision outside the charge-filing period; the later event did not involve a new use of a practice with the required element of discriminatory intent on the employer's part. *Chardon*, 454 U.S. at 8; *Ricks*, 250 U.S. at 258. These disparate-treatment cases do not purport to decide claim accrual where, as here, each subsequent use of an employment practice satisfies all elements of a disparate-impact violation. Pet. Br. 38-40.

B. This Court's cases do not permit the City to treat repeated post-adoption use of its eligibility list as lawful.

The City relies on *United Air Lines v. Evans* to claim that a discriminatory practice may be treated "as lawful" once the deadline for a challenge passes without a charge being filed. Resp. Br. 31 (quoting *Evans*, 431 U.S. at 558). The City's position is that its eligibility list became the "legal equivalent of a discriminatory act which occurred before [Title VII] was passed," and therefore "has no present legal consequences." *Id.* at 14 (quoting *Evans*, 431 U.S. at 558).

Evans does not insulate the City's eleven rounds of hiring from legal challenge for a simple reason. *Evans* was a disparate-treatment case in which the only alleged act of intentional discrimination was the plaintiff's one-time termination under the airline's policy prohibiting female flight attendants from marrying. 431 U.S. at 554-55. After the airline ended its no-marriage policy, Evans was rehired. *Id.* This Court held that her subsequent EEOC charge regarding the denial of seniority credit, due to the airline's "past act of [intentional] discrimination," was not timely because there was no subsequent application of a discriminatory policy. *Id.* at 558-60. Here, by contrast, petitioners challenged repeated uses of an employment practice that violated Title VII's disparate-impact prohibition. The City's multiple rounds of hiring directly involved—and the outcome each time was determined by—a hiring practice that met all elements of a disparate-impact violation.

The problem with the City's *Evans*-based analogy to pre-Act discrimination, Resp. Br. 14, 31, is demonstrated by an example drawn from *Griggs*. One of the challenged employment practices in *Griggs* was a high school diploma requirement for new hires and promotions. Duke Power had adopted this requirement almost ten years before Title VII was enacted. 401 U.S. at 427. The Court unanimously recognized that a failure to hire or promote African Americans—even when that failure was based on older, pre-Title VII criteria—violated the statute at the time those individuals were passed over and others were selected for jobs after the statute's effective date. *Id.* at 431-33. There was no discussion in

Griggs of limiting Duke Power's liability for the "neutral consequences" of past acts. *Cf.* Resp. Br. 31, 36-37.

Assume that, before the enactment of Title VII, Duke Power had adopted and announced a list of employees who had earned high school diplomas and thus were eligible for future promotions. Pre-Title VII, an African American employee passed over for a promotion because his name did not appear on the list would not have had a claim; but the same employee would have had a claim if, for the same reason, Duke Power failed to select him for a subsequent promotion after the effective date of Title VII. This reasoning is a straightforward application of the plain meaning of Title VII's disparate-impact provisions. The employer would have used a non-job-related practice to deny the promotion, that use would have caused a disparate impact, and therefore a present violation of the statute would have existed at the time of the use. *See* 42 U.S.C. § 2000e-2(a)(2), (h), (k)(1)(A); *Griggs*, 401 U.S. at 431-33. The same reasoning, applied to this case, explains why petitioners' charges were timely.

C. The Court should apply its disparate-impact accrual analysis from *Lorance*.

In *Lorance*, the Court articulated precisely how its Title VII accrual principle applies to disparate-impact claims. The Court recognized that, had the plaintiffs in *Lorance* been able to pursue a disparate-impact claim,[11] Title VII's "statute of limitations

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[11] Section 703(h) protects bona fide seniority systems from challenge on disparate-impact grounds. *Lorance*, 490 U.S. at 904-05.

[would have] run from the time that impact is felt." 490 U.S. at 908; *see also* Pet. Br. 31-32.

The City argues that assuming *Lorance*'s reasoning applies, petitioners felt the "entire impact" upon the adoption of the eligibility list. Resp. Br. 35; *see also id.* at 23-24. That view is inconsistent with *Lorance* itself. The Court in *Lorance* acknowledged that the plaintiffs felt the impact of the seniority system not just at the time it was adopted, but also upon their demotions several years later. 490 U.S. at 905-06, 908. Similarly, petitioners in this case felt the impact of the discriminatory cut-off score not only upon the adoption and announcement of the eligibility list, but each time the City used its hiring practice to exclude them from consideration when it filled firefighter positions. *See supra* Part I.B.

Ultimately, this is a case about jobs, not eligibility lists. When petitioners received notification that the City had adopted and announced an eligibility list, the full impact of the City's discriminatory hiring practice was still in the future. That full impact was not felt until the City actually used its hiring practice to fill jobs with applicants from a pool that discriminatorily excluded petitioners.[12]

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[12] Relying primarily on *Machinists v. NLRB*, 362 U.S. 411 (1960), the City also urges that cases addressing timeliness under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, support its argument. Resp. Br. 31-32. The NLRA, however, does not contain the plain text found in § 703(k), nor does it contain anything like a disparate-impact prohibition. Furthermore, in *Machinists*, the plaintiffs' challenge was based on a single, earlier event, which could not be the subject of an unfair labor practice complaint due to the statute of limitations. 362 U.S. at 416-17. Here, by contrast,

III. The City's policy arguments are inapposite and do not override Title VII's text.

The City's concerns about repose, prompt filing, and preservation of evidence are unpersuasive. The City also fails to address convincingly the risk that the accrual rule it proposes could flood government enforcement agencies with premature charges.

First, the City is incorrect that a plain-meaning interpretation of Title VII would subject employers to "open-ended liability." Resp. Br. 13. If an employer is concerned about being exposed to liability after each use of a discriminatory practice, it need only stop using the practice, which would have been easy for the City to do here. Pet. Br. 48. Moreover, job applicants or employees can recover only for injuries resulting from the particular uses of an unlawful employment practice that they timely challenge. *Cf. Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189-90 (1997).[13]

Second, notwithstanding the City's contrary arguments, Resp. Br. 49-51, a plain-meaning interpretation of Title VII encourages victims to file prompt charges in order to preserve the possibility of com-

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the City committed a fresh violation of Title VII each time it used its practice of hiring only applicants who scored 89 or above.

[13] For this reason, if petitioners prevail, they do not oppose a remand for the district court to consider a modification to the portion of its judgment pertaining to the City's first round of hiring. *See* Resp. Br. 30 n.5. Petitioners here contend that their EEOC charges were timely only with respect to the City's second and subsequent uses of its hiring practice. Pet. Br. 8 n.3; U.S. Br. 5-6.

prehensive relief. It is simply not the case that Title VII "frequently require[s] firing the person who was hired" pursuant to a discriminatory practice. *Id.* at 50. "Lower courts have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579 n.11 (1984); *see also* Barbara T. Lindemann & Paul Grossman, 2 *Employment Discrimination Law* 2722, 2724-25 (4th ed. 2007); Pet. Br. 47.

Third, the City overstates the risk of memory lapses in disparate-impact cases as a justification for its narrow accrual rule. Resp. Br. 46-48. The City never explains how it was disadvantaged in this case by the four-month difference between November 1996, when petitioners' EEOC charges would have been timely under the City's proposed rule, and March 1997, when petitioners actually filed their charges. In fact, well before November 1996, the City was on notice of petitioners' claims, Pet. App. 48a, and therefore had ample opportunity to preserve whatever evidence it wished for a trial that did not occur until several years later.[14]

As the only example of evidence that was lost due to the passage of time, the City points to the failure of its deputy personnel commissioner to recall at trial whether he ever calculated the difference in

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[14] This case took more than ten years to proceed from the filing of EEOC charges in March 1997 to the district court's entry of final judgment in April 2007. *See* Pet. App. 12a-13a, 19a; R. 404-05. It strains credulity for the City to argue that the case would have been resolved substantially sooner if the EEOC charges had been filed four months earlier. *See* Resp. Br. 28-29, 53.

adverse impact that would have resulted from selecting applicants in strict rank order rather than through random selection. *See* Resp. Br. 47-48 & n.14. But the district court did not rely on this evidence in deciding any issue, and the City does not attempt to explain how it could have helped prove job-relatedness. Nor does the City explain why, if it believed that such evidence could have been relevant or helpful, it did not take steps to preserve it after petitioners filed EEOC charges in March 1997.[15]

Finally, the City acknowledges that its proposed accrual rule may yield "some premature charges," Resp. Br. 50, but it fails to recognize that it is in the interest of neither employers nor employees to require potential plaintiffs to file charges before they can be sure that an employment practice will have any practical consequences. *See* Pet. Br. 48-50; U.S. Br. 32-33.

For instance, there may be little practical harm to minority applicants who receive the lowest qualifying scores on a test and are placed at the bottom of an eligibility list, if the employer ultimately decides to make offers to everyone on the list. Even if the test is

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[15] In general, pertinent evidence in disparate-impact cases is unlikely to erode over time in light of the record maintenance obligations in the *Uniform Guidelines on Employee Selection Procedures*. Pet. Br. 48. The City claims that the *Uniform Guidelines* merely "counsel that this information 'should' be kept on hand . . . but do not mandate it." Resp. Br. 48. As this Court has observed, however, employers "are required to maintain" such records under the *Uniform Guidelines*. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657-58 (1989) (quoting 29 C.F.R. § 1607.4(A)), *superseded by statute on other grounds*, Civil Rights Act of 1991, § 3(2), 105 Stat. at 1071.

clearly not job-related, the newly hired minority employees may have little reason to challenge it and risk antagonizing their new employer. Under the City's approach, however, the job applicants might be forced to bring challenges to a practice that does not later turn out to cause them any practical harm. In addition to fostering workplace strife, such an approach would impose unnecessary obligations on the EEOC as well as state and local enforcement agencies that are already struggling to manage increasing caseloads with shrinking budgets. *See* Br. of *Amicus Curiae* International Association of Official Human Rights Agencies 14-16; U.S. Br. 31-33.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

ARTHUR L. LEWIS, JR.; GREGORY S. FOSTER, JR.; ARTHUR C. CHARLESTON, III; PAMELA B. ADAMS; WILLIAM R. MUZZALL; PHILIPPE H. VICTOR; CRAWFORD M. SMITH; ALDRON R. REED; and AFRICAN AMERICAN FIRE FIGHTERS LEAGUE OF CHICAGO, INC., individually, and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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No. 08-974

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

The Solicitor General's submission that review should be granted disregards three crucial points. First, the circuit split on which petitioners and the

Solicitor General rely is unusually stale, and the issue very rarely arises. Br. in Opp. 21-32. Second, the circuits with old decisions in conflict with the decision below will have the opportunity, in any future cases, to consult the Court's consistent and recent guidance on the issue and harmonize themselves with the majority and modern view; potential plaintiffs, too, are on notice to calculate their EEOC-filing date under the more recent decisions. *Id.* at 25-31. Third, although the Solicitor General urges a different accrual rule in disparate-impact cases, the rule that a fresh violation must occur to trigger a new claim has nothing to do with the plaintiff's method of proof. Certainly, the limitations period for disparate-impact claims should not be longer than for disparate-treatment claims. *Id.* at 17-21. Further review is not needed just so this Court can again reaffirm that a new statutory wrong – not the present consequences of a past wrong – is necessary to start a new limitations period under Title VII.

1. The conflict on the question here – whether a disparate-impact claim based on a facially race-neutral examination and eligibility list created from the examination results accrues only when the list is adopted and announced, or also again thereafter, each time there is hiring from the same list – is extraordinarily stale. It surfaced almost 30 years ago, in 1981, when the Third Circuit in *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), cert. denied, 458 U.S. 1122 (1982), declined to follow the Second Circuit's 1980 decision in *Guardians Association v. Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980), cert. denied, 463 U.S. 1228 (1983). Tellingly,

even at that time, this Court denied certiorari in both *Bronze Shields* and *Guardians*.

Nothing since then supports a different result here. While the Solicitor General asserts that the issue is "recurring" (SG Br. 19), in fact it rarely arises. In nearly three decades, only five cases have decided the precise issue. Three of the cases – *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980), *Bronze Shields,* and *Guardians* – were decided in 1980 and 1981. After that, the issue did not emerge again for 19 years, in *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000), and then not for most of another decade, until the 2008 decision below.

Of those five cases, the two under which petitioners would prevail are the oldest, decided after *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), but before the other six relevant decisions from this Court. Since 1980, no circuit has accepted the position of petitioners and the Solicitor General. That is unsurprising, for the Court in the intervening years has repeatedly rejected all attempts by late-filing plaintiffs to date accrual not from when a statutory wrong occurred, but from when the consequences of a prior discriminatory practice were felt. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Chardon v. Fernandez*, 454 U.S. 6 (1981) (per curiam); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). See also *Bazemore v. Friday*, 478 U.S. 385 (1986) (discriminatory pay pursuant to facially discriminatory pay structure is current violation each time check is issued, not merely carrying forward of a past act of discrimination).

The Solicitor General contends the decision below also conflicts with *Bouman v. Block*, 940 F.2d 1211 (9th Cir.), cert. denied, 502 U.S. 1005 (1991). SG Br. 16-17 & n.3.[1] There, the court ruled that a claim directed to an eligibility list did not accrue until the list was taken down. See 940 F.2d at 1221. The court did not decide the issue here – whether each use of the list is a fresh violation. Moreover, the Solicitor General does not address the Ninth Circuit's decisions moving away from *Bouman*. Br. in Opp. 31-32. This Court also denied review in *Bouman*, when the conflict arguably had greater currency. *Bouman* thus provides no basis for further review.

2. The Solicitor General summarily states there is "little reason" to think the circuits will align without

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[1] The Solicitor General rightly does not endorse petitioners' view that the decision below conflicts with *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999), and *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), recognizing that those cases arose "in other contexts." SG Br. 17. As we explain (Br. in Opp. 30), *Anderson* involved a policy of pay and benefits discrimination based on race for which the limitations period ran anew with each paycheck or benefits decision. See *Ledbetter*, 550 U.S. at 633-47 (explaining *Bazemore*). *Beavers* involved a policy of denying health coverage to dependents who did not reside full time with the employee, which was also, at least arguably (Pet. App. 5a), a facially discriminatory policy (Br. in Opp. 29 & n.4). Application of an employment policy to both current and future employees, as in those cases, is far different from maintenance of an eligibility list. While new employees are hired (or their positions change), and they become subject to an employment policy on an ongoing basis, an eligibility list applies to everyone to whom it will ever apply at the outset; no one is newly affected only after the filing period has passed. Whatever the correct approach in cases like *Anderson* and *Beavers*, those cases do not bear on whether to grant review in this case.

this Court's immediate intervention, and that there has been "no relevant change in the law" since the 1980 Second and Fifth Circuit decisions. SG Br. 19. But after those decisions, the Court elaborated on *Evans*, and from *Ricks* to *Ledbetter* just two Terms ago, has developed a consistent body of case law governing the Title VII limitations period. For that reason, the more current decisions of the Third, Sixth, and Seventh Circuits, which have had the benefit of that entire line of cases, have been in harmony. If future cases arise, the Second and Fifth Circuits would also have the benefit of the intervening decisions of this Court and other circuits, and would likely reverse their earlier, incorrect positions.

The Solicitor General ignores that this process may already be underway. The district court in *United States v. New York*, No. 07-2067, 2009 WL 212154 (E.D.N.Y. Jan. 28, 2009), rejected a limitations defense. That issue may soon make its way to the Second Circuit, which could will surely evaluate *Guardians* against more modern decisions. Br. in Opp. 27-29. The Fifth Circuit never offered any analysis supporting its disposition. *Id.* at 25-26, 28-29. If the issue arose there again, the same wealth of well-reasoned, consistent decisions would reveal the 1980 ruling should not survive.

Morever, if (at worst) the early circuit decisions create some "uncertainty" (SG Br. 19) about the limitations period in a case like this, the three later decisions unquestionably alert a careful plaintiff that he should file an EEOC charge within 180 or 300 days of notice that he has been injured by an eligibility examination and list. As petitioners admitted, they knew of their injury from the start and could have filed sooner, but did not think they

had to. Pet. App. 11a. Until the conflict resolves itself, prudent plaintiffs even in the Second and Fifth Circuits would likely file on time, since the rule there is old, in the minority, and out of touch with this Court's consistent line of cases.

The paucity of cases involving the issue here, the consistent case law from both this Court and the three later circuits, and the ability of plaintiffs to protect themselves, avoid the Solicitor General's concern that denying review would "undermin[e] the uniform application of federal employment discrimination law." SG Br. 19. That concern, moreover, rings hollow when the law has not been uniform since 1981 – except that every case decided since then has uniformly rejected arguments like those petitioners and the Solicitor General advance here.

3. On the merits, this Court, from *Evans* to *Ledbetter*, has made clear that Title VII claims accrue when the unlawful act occurs, and that a new statutory wrong – not merely the present consequences of a prior act – is needed to trigger a new claim. The plaintiff must file a charge (in States with enforcement agencies) within 300 days of when the unlawful employment practice occurred. See 42 U.S.C. § 2000e-5(e)(1). As the Solicitor General agrees (SG Br. 13), petitioners were injured when they were informed that the City would hire from a group that did not include them. That "impact [was] felt" (*Lorance*, 490 U.S. at 908) from the outset. That started the limitations period. Petitioners' ineligibility to be hired when the City subsequently called candidates from the list was merely the "delayed, but inevitable, consequence of" (*Ricks*, 449 U.S. at 257-58) their not being on the eligibility list – an "adverse effect[ ] resulting from the past discrimi-

nation" (*Ledbetter*, 550 U.S. at 628). It was not a fresh statutory wrong; by using the list, the City committed no further act of discrimination (in treatment or in impact), and petitioners suffered no additional injury. If anything, petitioners stood a greater chance of being hired as the "well qualified" pool was exhausted, and ultimately the City did call applicants from the "qualified" pool.[2] Thus, the later rounds of hiring did not start the limitations clock anew. Pet. App. 4a, 6a-7a. Further review to once again reaffirm these governing principles is unwarranted.

a. The Solicitor General adds that disparate-impact claims have a different, and more liberal filing period than disparate-treatment claims because "the defining element of a disparate-impact claim is the effect of an employment practice on members of a protected group, rather than the employer's intent in adopting the practice." SG Br. 12. But even in disparate-treatment cases, an employer's intent alone will not support a claim. Rather, in both types of cases, the claim accrues when the employer engages in an employment practice that discriminates – whether in treatment or in impact. In neither case may the plaintiff wait for additional consequences of the practice to be felt before filing a claim. Indeed, disparate treatment and disparate impact are merely

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[2] That does not mean accrual is postponed to see whether the employer eventually "hire[s] from among the ranks of those adversely affected by the examination." SG Br. 15. Issues of damages calculation do not delay accrual. See, *e.g.*, *Wallace v. Kato*, 549 U.S. 384, 390-91 (2007). As for the possibility the employer may never "use the results to select employees for hire or promotion" (SG Br. 15), *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), sharply limits this option.

alternative methods of proving a Title VII claim, and plaintiffs may pursue both claims. It would "creat[e] uncertainty" (SG Br. 19) if the two claims accrued at different times. And it would be perverse to extend the filing period for disparate-impact claims, where the proof "involves the use of circumstantial evidence to create an inference of discrimination" (Pet. App. 5a), while continuing to enforce the tighter deadline for disparate-treatment claims, for which there is direct evidence of discrimination.

b. The Solicitor General further contends that the statutory text forbidding an employer "to limit, segregate, or classify . . . applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race . . ." supports extending the limitations period. SG Br. 7-8 (citing 42 U.S.C. § 2000e-2(a)(2)). Here, the City's eligibility list was the limitation or classification. Use of the list to call "well qualified" candidates in random order for further processing did not segregate or classify anyone, nor limit employment opportunities, based on race. The burden of proof in disparate-impact cases (*id.* at 7) does not fill this hole. That provision allows a plaintiff to prevail if, among other things, "a respondent uses a particular employment practice that causes a disparate impact on the basis of race." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Petitioners here demonstrated that use of the test results to create the eligibility list was such a practice but not that the subsequent random calling of applicants on the list had any further disparate impact.

c. The Solicitor General variously characterizes the Seventh Circuit as having held that "an employer's use of an invalid employment examination

accrues only when the examination is scored and the results announced" (SG Br. 7); that the analysis is "altered by [the City's] practice of preceding the hiring decisions by sorting test-takers into groups of 'qualified' and 'well qualified' applicants" (*id.* at 13); and that an employer is "immunized from liability merely because" it takes that "intermediate step" (*ibid.*). These arguments describe neither the decision below nor our submission. Rather, as the court held, the City used an unlawful employment practice when it created a hiring eligibility list of "well qualified" applicants from a test with disparate impact, and gave notice to every applicant in the "qualified" pool, including petitioners, that this list would govern hiring over the next several years. That is when "the discriminatory act occur[red]" (*Ledbetter*, 550 U.S. at 621), and thus when petitioners' claim accrued. There was no further "use" of the test "to hire" (SG Br. 7) after that.

In addition, to the extent the Solicitor General uses "immunity" to describe the statute of limitations, the assertion that the City was "not immunized" by the "intermediate step" of classifying applicants cannot be squared with this Court's cases. (SG Br. 13) Where the "intermediate step" is the actionable wrong, and the belated claim merely another challenge to that "raw resul[t]" (*ibid.*), the employer certainly is "immunized" – or, more properly, the claim is time barred. For example, the college in *Ricks* was "immunized" by the "intermediate step" of denying the plaintiff tenure; the employer in *Lorance* by the "intermediate step" of adopting a discriminatory seniority system; and the employer in *Ledbetter* by the "intermediate step" of providing discriminatory evaluations. These claims, like petitioners' here, were all untimely because, as this

Court has consistently ruled, the occurrence of predictable consequences of a prior discriminatory act does not restart the limitations period.[3]

d. The Solicitor General urges that the decision below would encourage "premature charges" that would "impos[e] substantial burdens on both the EEOC and the courts" (SG Br. 20), and "could undermine enforcement of Title VII's disparate-impact provisions" (*id.* at 19). The circuits first disagreed on this issue in 1981. The Solicitor General points to no adverse effects on the EEOC, or enforcement of Title VII, to date. Because the careful plaintiff pursues claims in a timely fashion, and as the Solicitor General urges, "candidates for employment or promotion have little incentive to delay unreasonably in filing EEOC charges" (*id.* at 14), likely no such effects have occurred.

Ultimately, the Solicitor General's arguments for a longer limitations period in disparate-impact cases, simply disagree with Congress's clear policy choices. Congress obviously could have opted for a longer or more flexible limitations period, emphasizing the need for strict enforcement and compensation for all injuries. But, as this Court has repeatedly recognized, Congress made a purposeful judgment that a short limitations period would encourage victims of employment discrimination to file their claims quickly, allowing agencies (and, if necessary,

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[3] Petitioners' problem is not that they challenge a practice "in some way connected to earlier violations." SG Br. 11. It is, rather, the nature of the "connection." Where the later event is the consequence of an earlier one, and no further act of discrimination has occurred, the later event is not actionable. Petitioners' claim is untimely because no new statutory wrong was committed after the list was adopted and announced.

the courts) to resolve such claims promptly. This ensures that memories are clear; the harm is limited; and reliance interests of employers and other employees have not yet crystallized. Br. in Opp. 18-20. Even if "the passage of time . . . does not . . . raise the same concerns" as in disparate-treatment cases, the most that can be said is that evidence in disparate-impact cases may be "less likely to 'fade quickly with time.'" SG Br. 14-15 (quoting *Ledbetter*, 550 U.S. at 631). Still, the memories of those who made decisions concerning the examination and the eligibility list will fade, risking loss of that evidence over time. A short and firm filing period protects the interests in repose and reliance, which are especially important in cases involving eligibility lists, which can be used for several years.

More puzzling is the Solicitor General's further submission that the decision below "encourages – indeed, requires – plaintiffs to file lawsuits before they can be sure of the practical consequences of an employer's administration of an unlawful selection device – and may poison the workplace with anticipatory litigation before facts have crystallized." SG Br. 15. Those concerns, again, ignore Congress's choice of a short filing period, which necessarily pressures plaintiffs to file earlier. Beyond that, if anything should be clear from this Court's cases (see, *e.g.*, *Lorance*, 490 U.S. at 907 n.3; *Chardon*, 454 U.S. at 8; *Ricks*, 449 U.S. at 260-61), it is that a Title VII plaintiff cannot wait to be absolutely certain about the consequences of an employment action. Rather, the time to file runs from the unlawful act, even if that is before all the consequences are known with certainty or have taken effect.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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September 2, 2009

AMICUS CURIAE BRIEF

No. 08-974

In the Supreme Court of the United States

ARTHUR L. LEWIS, JR., ET AL., PETITIONERS

v.

CITY OF CHICAGO, ILLINOIS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that an employer's use of an employment examination has an unlawful disparate racial impact, when the employer uses the results of the examination to hire employees during the statutory limitations period, but scores the examination and announces the results outside the limitations period.

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

This case presents the question whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that an employer's use of an employment examination has an unlawful disparate racial impact, when the employer uses the results of the examination to hire employees during the statutory limitations period, but scores the examination and announces the results outside the limitations period. The United States has a significant interest in the resolution of that question. The Attorney General enforces Title VII against public employers, and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. In addition, Title VII applies to the federal government as an

employer. See 42 U.S.C. 2000e-16. The United States, as the principal enforcer of the civil rights laws and the Nation's largest employer, has a strong interest in the proper enforcement of Title VII. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. a. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a). The statute proscribes both "overt discrimination" (known as "disparate treatment") and "practices that are fair in form, but discriminatory in operation" (known as "disparate impact"). *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971); accord *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2672-2673 (2009). This case concerns Title VII's prohibition on disparate-impact discrimination.

Under Title VII, an "unlawful employment practice based on disparate impact is established" if the plaintiff shows that "a particular employment practice * * * causes a disparate impact on the basis of race, color, religion, sex, or national origin," and the employer "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i). If the employer satisfies that burden, a plaintiff may nevertheless establish a disparate-impact violation "by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs." *Ricci*, 129 S. Ct. at 2673 (citing 42 U.S.C. 2000e-2(k)(1)(A)(ii) and (C)). A plaintiff who establishes

that an employer has engaged in a practice with an unlawful disparate impact is not entitled to damages, 42 U.S.C. 1981a(a)(1), but may be awarded appropriate equitable relief, 42 U.S.C. 2000e-5(g)(1).

b. To file suit under Title VII, a plaintiff must first file a timely charge with the EEOC. A charge is generally timely if it is filed within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). But in States that have an administrative agency with authority to remedy practices prohibited by Title VII, a plaintiff who initially proceeds before that agency must file a charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred" or within 30 days of receiving notification that the state agency proceedings have been terminated, whichever is earlier. *Ibid.* Because the events at issue in this case took place in Illinois, which has such an administrative agency, the applicable limitations period under Section 2000e-5(e)(1) is 300 days. See Pet. App. 51a.[1]

2. In July 1995, respondent administered a written examination to more than 26,000 applicants as part of its hiring process for entry-level firefighters. After scoring the test, respondent grouped the scores into three categories: applicants who scored 89 or above were deemed "well qualified," applicants who scored between 65 and

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[1] Illinois, like many States, has entered into a worksharing agreement with the EEOC under which filing a charge with the EEOC also initiates a state proceeding that is subject to immediate termination if the State waives its right of initial processing over the claim. See, *e.g.*, *Hong* v. *Children's Mem. Hosp.*, 936 F.2d 967, 968-969 (7th Cir. 1991); see also 29 C.F.R. 1601.13(a)(4)(ii)(A); *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 112 (1988).

88 were "qualified," and the remaining applicants failed the examination. Pet. App. 1a-2a, 45a.

On January 26, 1996, respondent sent all applicants written notifications of their test scores. Pet. App. 2a, 46a. The "well qualified" applicants "would be eligible to proceed to the next phase of the hiring process, a physical abilities test," followed by a background investigation, medical examination, and drug test. *Id.* at 14a-15a. An applicant who passed each of those additional tests would be "hired as a candidate firefighter." *Id.* at 15a. Applicants who failed the examination were told that they would no longer be considered for employment. *Id.* at 47a. The notice for applicants in the "qualified" class stated:

> Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

E.g., J.A. 35; see Pet. App. 2a, 46a-47a.

On the same day that respondent sent the notices to the applicants, the mayor issued a press release concerning the test results. J.A. 51-54; see Pet. App. 46a-47a. The release stated that 1782 of the applicants who took the written examination were considered "well qualified" and would be contacted in random order to continue in the hiring process. J.A. 54; see Pet. App. 47a. The release further stated that, in the "well qualified" group, 75.8% were white and 11.5% were African-

American. *Ibid.* By contrast, white applicants represented 45% of all applicants, while African-Americans represented 37%. Pet. App. 15a. Finally, the release stated that the mayor was dissatisfied with the lack of diversity among the "well qualified" applicants. J.A. 51-52; see Pet. App. 47a. Local media subsequently reported the racial breakdown of the test results. *Id.* at 48a; see J.A. 55-56, 59-60.

In May 1996, respondent hired applicants from the "well qualified" group. It did so for a second time in October 1996, and ultimately engaged in a total of 11 rounds of hiring from that group. Pet. App. 49a, 68a; Pet. 6; Br. in Opp. 4; Dist. Ct. Injunctive Order of Relief 4 (Apr. 17, 2007) (Injunctive Order).

In 2001, when the list of "well qualified" applicants was exhausted, respondent decided to begin calling applicants from the "qualified" group for further processing for hire. Pet. App. 16a. It hired applicants from the "qualified" group from 2002 until 2007. Br. in Opp. 4 n.1.

3. Petitioners represent a class of African-American firefighter applicants who were placed in the "qualified" category based on their scores on the July 1995 examination. Pet. App. 1a-2a. On March 31, 1997, petitioner Crawford M. Smith filed a charge of racial discrimination with the EEOC based on respondent's use of the July 1995 examination; other petitioners subsequently filed additional charges. *Id.* at 49a; Def. Mot. for Summ. J. Attach 2, Pt. 2, Exh. 3 (Feb. 18, 2000). Smith's charge was filed within 300 days of October 1, 1996, the date on which respondent hired its second class of firefighter candidates from the list of individuals ranked as "well qualified" based on the results of the July 1995 examination. The charge was, however, filed

more than 300 days after respondent administered the examination, scored the results, and notified the plaintiff-applicants that they were "qualified." Pet. App. 3a, 49a; Injunctive Order 4.

The EEOC issued right-to-sue letters on July 28, 1998. Pet. App. 49a. On September 9, 1998, petitioners filed suit in the United States District Court for the Northern District of Illinois, alleging that respondent's use of the July 1995 test as the first step in the firefighter hiring process had an impermissible disparate impact on African-American candidates, in violation of Title VII. *Ibid.*; see *id.* at 2a, 49a; J.A. 1-14.

Respondent moved for summary judgment, arguing that petitioners' suit was time-barred because petitioners' first EEOC charge was filed more than 300 days after petitioners were notified that they had been ranked as "qualified" based on the results of the July 1995 examination. Pet. App. 52a. The district court denied the motion. *Id.* at 44a-70a. The court distinguished this case from *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), in which this Court held that allegations of intentional national origin discrimination were untimely where the alleged discriminatory act—the denial of tenure—occurred outside the limitations period, even though the plaintiff felt the effects of that act, the termination of his employment, within the limitations period. Pet. App. 54a-55a (citing *Ricks*, 449 U.S. at 257-258). In this case, the district court noted, petitioners "allege[d] that the 1995 examination had a disparate impact on African-American firefighter candidates, and that [respondent's] reliance on the examination's results continues to have a disparate impact on African-American candidates." *Id.* at 60a. The court concluded that, "if [petitioners] establish that the 1995 written examination

used in [respondent's] firefighter selection process had an unlawful disparate impact on African-American candidates, then [respondent's] ongoing reliance on those results constitutes a continuing violation of Title VII." *Id.* at 69a.

After an eight-day bench trial, the district court ruled that respondent's use of the July 1995 examination violated the disparate-impact provisions of Title VII. Pet. App. 12a-43a. The parties had stipulated that the July 1995 test "had a severe disparate impact on African-American firefighter candidates." *Id.* at 28a. The court found that respondent had failed to discharge its statutory burden of showing that its use of the test was "job related for the position in question" and "consistent with business necessity," 42 U.S.C. 2000e-2(k)(1)(A)(i). Pet. App. 28a-42a. Specifically, the court found that the test "was skewed towards one of the least important aspects of the firefighter position"—namely, "the candidate's ability to take notes"—"at the expense of more important abilities," *id.* at 31a-32a; that "the cut-off score of 89 is statistically meaningless in that it fails to distinguish between candidates based on their relative abilities," *id.* at 30a; and that respondent "failed to prove that test results could be used to predict firefighter performance," *ibid.* See *id.* at 28a-41a. The court further found that "the evidence clearly shows that an equally valid and less discriminatory alternative was available"—specifically, "randomly select[ing] candidates who passed the exam for further evaluation." *Id.* at 41a-42a (citing 42 U.S.C. 2000e-2(k)(1)(A)(ii)). The court entered judgment in favor of petitioners and ordered injunctive relief. *Id.* at 2a.

4. On appeal, respondent did not contest that its use of the July 1995 examination violated Title VII's dis-

parate-impact provisions. It instead challenged only the district court's holding that petitioners had timely filed a charge with the EEOC. Resp. C.A. Br. 16-47. Agreeing with respondent's submission, the court of appeals reversed. Pet. App. 1a-11a.

The court of appeals concluded that the discrimination at issue "was complete when the tests were scored and, especially in light of the mayor's public comment about them, was discovered when the applicants learned the results." Pet. App. 4a. Analogizing this case to *Ricks*, the court further concluded that "[t]he hiring only of applicants classified 'well qualified' was the automatic consequence of the test scores rather than the product of a fresh act of discrimination." *Ibid.* The court accordingly held that petitioners' claim accrued in January 1996, when respondent placed petitioners in the "qualified" category and "delayed indefinitely their being hired." *Id.* at 9a. Because petitioners had not filed a charge within 300 days of that date, the court of appeals instructed the district court to enter judgment for respondent. *Id.* at 11a.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that petitioners' EEOC charge was untimely.

A. The period for filing a charge of employment discrimination with the EEOC commences on the date on which "the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). Under Title VII, it is an "unlawful employment practice" "to limit, segregate, or classify" employees or job applicants "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's

race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2). An employer engages in an "unlawful employment practice based on disparate impact" when it "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(k)(1)(A)(i). Where, as here, an employer administers an employment examination that has an impermissible disparate racial impact, the employer violates Title VII each time it "uses" the results of the test, 42 U.S.C. 2000e-2(k)(1)(A)(i), to select employees in a manner that would "adversely affect" individuals based on race, 42 U.S.C. 2000e-2(a)(2).

B. Nothing in this Court's Title VII statute of limitations jurisprudence compels a different result. In a line of cases culminating with the recent decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), this Court held that an EEOC charge alleging intentional discrimination is untimely where no intentionally discriminatory act occurred within the limitations period, even though the plaintiff may claim to presently feel the effects of that past intentionally discriminatory act. Those cases do not stand for the broad proposition that a violation of Title VII is never separately chargeable when the violation is related to, or even the consequence of, a prior discriminatory act. Their holdings instead reflect the point at which a violation occurs in a disparate-treatment case: because discriminatory intent is a necessary element of a claim of intentional discrimination, a plaintiff who does not allege any discriminatory intent occurring within the limitations period does not describe a violation of Title VII based on disparate treatment.

A disparate-impact claim, by contrast, focuses on the consequences of an employment practice, rather than the intent underlying it. For that reason, this Court has previously acknowledged that a disparate-impact claim, in contrast to a disparate-treatment claim, accrues "from the time that impact is felt." *Lorance* v. *AT&T Techs., Inc.*, 490 U.S. 900, 908 (1989); cf. *Ledbetter*, 550 U.S. at 640. Here, each time respondent passed petitioners over for entry-level firefighter positions based on their performance on an invalid test, it used an unlawful selection device that had an impermissible disparate racial impact. Petitioners were entitled to challenge any such use that occurred within the limitations period.

C. A rule that permits a claimant to challenge each use of an employment practice with an unlawful disparate impact is consistent with the policy objectives underlying Title VII's charge filing provision. Because plaintiffs may prosecute only those uses that occur within the limitations period, such a rule upsets no legitimate interests in repose. Plaintiffs have no incentive to delay unreasonably in filing charges. And the evidence typically used in disparate-impact cases, which focuses on statistical impact and validity, is unlikely to fade over time, especially as compared with inquiries into decisionmakers' intent.

A contrary rule would allow an employer to continue using an unlawful selection device indefinitely, so long as no applicant filed an EEOC discrimination charge within 180 or 300 days of the announcement of the results. It would also require applicants to file discrimination charges even before they know whether and how the employer will use the examination results to make hiring decisions. Such a rule would merely encourage prema-

ture and unnecessary litigation that would burden employers, the EEOC, and courts alike. Neither Title VII nor this Court's cases command that result.

ARGUMENT

PETITIONERS' CHARGE WAS TIMELY BECAUSE IT CHALLENGED AN UNLAWFUL EMPLOYMENT PRACTICE THAT OCCURRED WITHIN THE LIMITATIONS PERIOD

A. A Title VII Violation Occurs, And A Claim Accrues, When An Employer Uses The Results Of A Test That Has An Impermissible Disparate Impact To Make Hiring Decisions

The period for filing a charge of employment discrimination with the EEOC commences on the date on which "the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). Under Title VII, it is an "unlawful employment practice" "to limit, segregate, or classify" employees or job applicants "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2). An employer engages in an "unlawful employment practice based on disparate impact" when, without adequate justification, it "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin," 42 U.S.C. 2000e-2(k)(1)(A)(i), thereby limiting, segregating, or classifying job applicants or employees in a manner that adversely affects members of a protected group, 42 U.S.C. 2000e-2(a)(2).

Respondent in this case "used" such an employment practice each time it hired entry-level firefighters from a group of applicants deemed "well qualified" based on

the results of the July 1995 examination—an examination that undisputedly had a disproportionate adverse racial impact and "was not a valid test of aptitude for firefighting." Pet. App. 2a. Each time respondent used its score-based rankings to hire new classes of firefighters, it disproportionately excluded qualified African-American applicants in violation of Title VII's disparate-impact provisions. Because petitioners filed their first charge of discrimination with the EEOC within 300 days of such a hiring decision, petitioners were entitled to challenge that decision in court and to seek appropriate equitable relief.

1. In considering the timeliness of charges under Title VII, this Court has emphasized that the "most salient source for guidance is the statutory text." *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 109-110 (2002). As relevant here, Title VII provides that a "charge under this section shall be filed" within 180 or 300 days (depending on the State) "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). The answer to the question of when the practice occurred "varies with the practice." *Morgan*, 536 U.S. at 110.

2. Under Title VII, an employer engages in an "unlawful employment practice based on disparate impact" whenever it "uses" the results of an employment test with an impermissible disparate racial impact in making hiring decisions, thereby limiting or classifying job applicants in a manner that adversely affects members of a protected group. 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A).

a. This Court first discussed Title VII's prohibition on disparate-impact discrimination in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, the Court held that an employer violated Title VII by using a stan-

dardized general intelligence test as a condition of employment when the test had not been shown to be "significantly related to successful job performance" and disqualified African-American candidates "at a substantially higher rate" than white candidates. *Id.* at 425-426. The Court accepted the premise that the testing requirement was not intended to discriminate on the basis of race. *Id.* at 432. But Title VII, the Court made clear, "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431; see also *ibid.* (explaining that Title VII mandates "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification"). The Court explained that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432.

At the time *Griggs* was decided, Title VII "did not include an express prohibition on policies or practices that produce a disparate impact." *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2672 (2009). *Griggs* rested on an interpretation of Section 2000e-2(a)(2), which makes it an "unlawful employment practice" for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." 42 U.S.C. 2000e-2(a)(2); *Griggs*, 401 U.S. 426 n.1; see, *e.g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988); *Connecticut* v. *Teal*, 457 U.S. 440, 448 (1982); see also *Smith* v. *City of Jackson*, 544 U.S. 228, 235-236 (2005). The decision also rested in part on an interpretation of

Section 2000e-2(h), which provides that it "shall not be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or *action upon the results* is not designed, intended, or *used* to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. 2000e-2(h) (emphases added); see *Griggs*, 401 U.S. at 426 n.1, 433-436.

Twenty years after *Griggs*, Congress "codif[ied] the prohibition on disparate-impact discrimination" in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. *Ricci*, 129 S. Ct. at 2673. The "disparate-impact statute," *ibid.*, states that "[a]n unlawful employment practice based on disparate impact is established" when the plaintiff "demonstrates that [an employer] *uses* a particular employment practice that *causes* a disparate impact on the basis of race, color, religion, sex, or national origin," and the employer "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity," or the plaintiff demonstrates that the employer refuses to adopt an alternative employment practice with less disparate impact that would satisfy the employer's legitimate business needs. 42 U.S.C. 2000e-2(k)(1)(A) and (C) (emphases added); see *Ricci*, 129 S. Ct. at 2673.

b. In ordinary parlance, an employer "uses" a particular employment practice whenever it selects employees on the basis of that practice. See *Watson* v. *United States*, 552 U.S. 74, 79 (2007) ("With no statutory definition or definitive clue, the meaning of the verb 'uses' has to turn on the language as we normally speak it."); see also, *e.g.*, *Ricci*, 129 S. Ct. at 2691 (Ginsburg, J., dissenting) (explaining that "New Haven must *use* competitive

examinations to fill vacancies in fire officer and other civil-service positions") (emphasis added); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 585 (1983) (opinion of White, J.) (noting that, when the New York City Police Department selected employees based on their scores on several written examinations, the examinations "were *used* to make entry-level appointments") (emphasis added).

Where, as here, an employer hires employees on the basis of an invalid test with a disproportionate adverse impact on members of a racial group, the employer "uses" an impermissible practice that "limit[s]" qualified applicants in a manner that adversely affects them because of race. 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A). That conclusion is consistent with Title VII's testing provision, which permits "an employer to give and to act upon the results of any professionally developed ability test" only if "action upon the results is not * * * used to discriminate because of race." 42 U.S.C. 2000e-2(h). Each time an employer hires employees based on the results of an invalid test with a disparate racial impact, it "act[s] upon the results" of the test, *ibid.*, in a manner that excludes members of a protected group from job opportunities for reasons unrelated to job performance, see *Griggs*, 401 U.S. at 433-436.

3. Respondent does not appear to quarrel with the proposition that basing hiring decisions on the results of a test with an impermissible disparate impact is ordinarily a violation of Title VII. Respondent submits (Supp. Br. in Opp. 8-9), however, that its hiring decisions are not actionable in this case because those decisions followed an initial classification of test-takers as "qualified" or "well qualified." According to respondent, that initial classification was a discriminatory act. But once

the test-takers had been sorted into their respective categories on its hiring eligibility list, respondent claims, "[u]se of the list to call 'well qualified' candidates in random order for further processing did not segregate or classify anyone, nor limit employment opportunities," and had no "further disparate impact." *Id.* at 8.

Respondent's efforts (Supp. Br. in Opp. 8) to distinguish between its "use of the test results" (discriminatory) and "[u]se of the list" (not discriminatory) are unavailing. It is undisputed that the test results formed the entire basis of the eligibility list. "Use of the list" thus *was* "use of the test results" for purposes of discerning whether the practice had an impermissible disparate impact. Respondent acknowledged as much in its November 1998 answer to petitioners' complaint, which was filed well after the initial compilation of the eligibility list and announcement of the test results in January 1996. See J.A. 16 ("Defendant admits that it *has used and continues to use results* of the 1995 fire fighter entrance examination as part of its fire fighter hiring process.") (emphasis added); J.A. 22 ("Defendant states that since 1996 and continuing to the present time, it has *used the results* of the 1995 fire fighter entrance examination as part of its process for hiring probationary fire fighters in the Chicago Fire Department.") (emphasis added). And contrary to respondent's suggestion (Supp. Br. in Opp. 8), its use of the list in hiring entry-level firefighters in this case "limit[ed]" the employment opportunities of qualified African-American applicants in the exact same way it would have done if respondent had used the raw test results instead. 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A). In the former case no less than the latter, as the district court concluded, respondent's "decision to select only those applicants who

scored 89 and above meant that white applicants were five times more likely than African-Americans to advance," even though "there is no difference between whites and African-Americans in firefighter performance." Pet. App. 15a-16a.

It may be, as respondent says, that once the hiring list was compiled, the "subsequent random calling of applicants on the list" did not have "any *further* disparate impact"—that is, an adverse racial impact exceeding the impact of the test and its use to create a hiring eligibility list. Supp. Br. in Opp. 8 (emphasis added). But nothing in Title VII requires a demonstration of "*further* disparate impact," or impact exceeding the adverse impact of a previous unlawful act. What Title VII forbids is simply the "use[]" of "a particular employment practice that causes a disparate impact." 42 U.S.C. 2000e-2(k)(1)(A). When respondent hired firefighter candidates from the list of applicants who scored in the "well qualified" range on the July 1995 examination, it engaged in such a practice. Because petitioners filed an EEOC charge within 300 days after that practice occurred, they were entitled to challenge the practice in federal court and to seek appropriate equitable relief.[2]

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[2] Because petitioners' charge was filed within 300 days of an independently unlawful act—namely, respondent's use of the July 1995 test results to hire entry-level firefighters in a manner that disproportionately excluded qualified African-American candidates—the Court need not decide whether the "continuing violation" theory applies in this case. See Pet. App. 7a-9a (comparing "repetitive" with "continuing" violations). For the same reason, petitioners' charge was timely even if, as respondent argues (Supp. Br. in Opp. 6-7, 9), petitioners could earlier have brought an EEOC charge based on the compilation of the eligibility list alone.

B. A Title VII Violation Is Actionable Even Though It Follows From Previous Violations

In concluding that petitioners' claim was untimely, the court of appeals did not consider the language of either Title VII's disparate-impact provisions or its charge filing provision. The court instead relied on a line of cases including *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which held that, to sustain a claim of intentional discrimination, a plaintiff must identify an act of intentional discrimination occurring within the statutory limitations period, and may not simply point to the effects of a past intentionally discriminatory act.

Insofar as the *Ricks-Lorance-Ledbetter* line of cases is relevant in this disparate-impact case, the cases merely reaffirm the basic principle that the time for filing an EEOC charge commences when the alleged unlawful act occurs. They do not, as the court of appeals appeared to reason, stand for the broad, textually unsupportable position that a discriminatory act is immune from challenge if can be said to be an "automatic consequence" of an earlier Title VII violation that occurred outside the limitations period.

1. In *Ricks*, the plaintiff, a college professor, claimed that his employer intentionally discriminated against him on the basis of national origin when it denied him tenure and instead offered him a one-year "terminal" contract. 449 U.S. at 252-253. The plaintiff filed a charge with the EEOC shortly before the contract expired. *Id.* at 254. The Court held that the limitations period began to run when the tenure decision had been made and communicated to the plaintiff, "even though

one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* at 258. The Court explained that the "emphasis is not upon the effects of earlier employment decisions; rather, it 'is [upon] whether any present *violation* exists.'" *Ibid.* (brackets in original) (quoting *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977)). Because the only claimed violation concerned the denial of tenure, and the plaintiff had not identified any "discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment," the Court concluded that the plaintiff's EEOC charge was untimely. *Id.* at 257-258.

Similarly, in *Lorance*, the plaintiffs alleged that a contractual modification in the seniority system for testers at an electronics plant was the product of intentional sex discrimination, but did not file an EEOC charge until years later, when they were selected for demotion under the new seniority system. 490 U.S. at 901-902. The Court held that the charge was filed too late. It specifically noted that, if the "claim asserted [were] one of discriminatory impact under § 703(a)(2)," the "statute of limitations [would] run from the time that impact is felt." *Id.* at 908. But because the claim asserted was instead one of intentional discrimination, and "[b]ecause the claimed invalidity of the facially nondiscriminatory and neutrally applied tester seniority system is wholly dependent on the alleged illegality of signing the underlying agreement," the Court concluded that "it is the date of that signing which governs the limitations period." *Id.* at 911.[3]

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[3] In response to *Lorance*, Congress amended Title VII to provide that an "unlawful employment practice occurs, with respect to a sen-

Finally, in *Ledbetter*, the Court concluded that the plaintiff's claim of intentional pay discrimination was time-barred because the alleged discrimination occurred outside the statutory limitations period, rejecting the plaintiff's argument that the discrimination had been carried forward in the form of reduced pay and the denial of a raise. 550 U.S. at 624. The Court emphasized that the petitioner "ma[de] no claim that intentionally discriminatory conduct occurred during the charging period." *Id.* at 628; accord *id.* at 624. The Court concluded that accepting the petitioner's argument that an "unlawful employment practice" nevertheless occurred during the limitations period, as Section 2000e-5(e)(1) demands, would "require us in effect to jettison the defining element of the legal claim on which her Title VII recovery was based"—namely, "discriminatory intent." *Ibid.*[4]

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iority system that has been adopted for an intentionally discriminatory purpose * * * when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." 42 U.S.C. 2000e-5(e)(2); see *Ledbetter*, 550 U.S. at 627 n.2.

[4] In response to *Ledbetter*, Congress amended Title VII to provide that an "unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5-6 (to be codified at 42 U.S.C. 2000e-5(e)(3)(A)); see *AT&T Corp.* v. *Hulteen*, 129 S. Ct. 1962, 1973 (2009).

2. Specifically analogizing this case to *Ricks*, the court of appeals held that petitioners' EEOC charge was untimely because respondent's discrimination "was complete when the tests were scored" and petitioners were informed that it was "not likely" that they would be hired. Pet. App. 4a, 46a (citation omitted). In the court's view, respondent's subsequent hiring practices were the "automatic consequence" of the earlier testing, and thus could not qualify as a "fresh act of discrimination" that was separately chargeable within its own limitations period. *Id.* at 6a.

Title VII's disparate-impact provisions do not, however, speak of "automatic consequences." They speak of "uses" of employment practices that cause a disparate impact. 42 U.S.C. 2000e-2(k)(1)(A). And the *Ricks-Lorance-Ledbetter* line of cases does not stand for the broad proposition that any employment practice following from an earlier act of discrimination is not actionable under Title VII. On the contrary, the Court made clear in *Ledbetter* that "a freestanding violation may always be charged within its own charging period regardless of its connection to other violations." 550 U.S. at 636. When a plaintiff alleges a series of related discriminatory acts, "[e]ach discrete discriminatory act starts a new clock," and a charge is timely if "filed within the 180- or 300-day time period after the discrete discriminatory act occurred." *Morgan*, 536 U.S. at 113. Nor is it relevant whether the employee had knowledge of prior similar acts or the course of illegal conduct of which they were a part: "The existence of past acts and the employee's prior knowledge of their occurrence * * * does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are

themselves timely filed." *Ibid.*; accord *Ledbetter*, 550 U.S. at 636.

The claims in *Ricks*, *Lorance*, *Ledbetter*, and other similar cases failed not because they alleged acts that followed from earlier violations, but because they failed to allege that a violation occurred at any point during the limitations period: the claims rested on allegations of intentional discrimination, but their description of the events occurring within the limitations period omitted the "defining element of [that] legal claim," namely, "discriminatory intent." *Ledbetter*, 550 U.S. at 624.

Unlike the intentional discrimination claims at issue in those cases, the "defining element" of a disparate-impact claim is the effect of an employment practice on members of a protected group, rather than the employer's intent in adopting the practice. Compare *Ledbetter*, 550 U.S. at 624, with *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 n.15 (1977) ("Proof of discriminatory motive * * * is not required under a disparate-impact theory."). That difference necessarily affects the evaluation of the timeliness of an EEOC charge. While the Court held in *Ricks* and similar cases that "the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt," *Ledbetter*, 550 U.S. at 627, the Court has acknowledged that a claim of discriminatory impact "caus[es] the statute of limitations to run from the time that impact is felt," *Lorance*, 490 U.S. at 908.

In *Lorance*, for example, this Court acknowledged that, had the plaintiffs been statutorily entitled to bring a disparate-impact challenge to the allegedly discriminatory seniority system at issue, that challenge would have

been timely, even though their disparate-treatment challenge was not. 490 U.S. at 904-906. Similarly, in *Ledbetter*, the Court acknowledged that, had the plaintiff pursued a claim under the Equal Pay Act of 1963 (EPA), 29 U.S.C. 206(d), her challenge to the pay disparity at issue would have been timely, although her Title VII disparate-treatment claim was not. *Ledbetter*, 550 U.S. at 640. The Court explained that the EPA, unlike Title VII's disparate-treatment provisions, does not require "proof of intentional discrimination." *Ibid.*; see also *id.* at 641 (distinguishing the accrual rules governing a claim under the minimum wage and overtime provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, on the ground that such a claim "does not require proof of a specific intent to discriminate").

3. The analysis is not altered by respondent's practice of preceding hiring decisions by sorting test-takers into groups of "qualified" and "well qualified" applicants. See Pet. App. 4a.

It is true, as the court of appeals noted, that petitioners were injured when they were told that they had been classified as "qualified" rather than "well qualified" based on the results of the July 1995 examination, thereby "delay[ing] indefinitely their being hired," *id.* at 9a. But petitioners were also injured when they were in fact passed over because of these results: Each time respondent used the results of an invalid test to hire employees in a manner that disproportionately excluded African-Americans, petitioners "felt" anew the "impact" of respondent's practices. *Lorance*, 490 U.S. at 908.

Although the promulgation of the eligibility list may have made the adverse impact of respondent's hiring decisions somewhat more "predictable," Supp. Br. in

Opp. 10, Title VII's disparate-impact provisions are not limited to unforeseen or unforeseeable acts of discrimination. Title VII does not prohibit only the first in a line of related unlawful actions, or only those employment actions whose adverse impact somehow differs from or exceeds the impact of a prior unlawful act. Rather, Title VII forbids every employment action, including every decision to hire, that has an unjustified disparate impact on a prohibited basis. See 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A); pp. 11-17, *supra*.

Finally, to the extent that the court of appeals suggested that the compilation of the eligibility list was an "intervening neutral act" that rendered respondent's later hiring decisions nondiscriminatory, that suggestion finds no support in Title VII. Pet. App. 5a. Although the "hiring only of applicants classified as 'well qualified'" based on the test scores, like the "policy of basing hiring on test scores," *id.* at 4a, is a facially neutral practice, the very point of Title VII's disparate-impact provisions (in contrast to its disparate-treatment provisions) is to identify those "facially neutral practices that, in fact, are 'discriminatory in operation.'" *Ricci*, 129 S. Ct. at 2672-2673 (quoting *Griggs*, 401 U.S. at 431).

In short, an employer who would be prohibited from using the raw results of an unlawful test is not immunized from liability merely because it took the intermediate step of labeling candidates "qualified" or "well qualified" based on those test results. Petitioners in this case alleged a violation of Title VII's disparate-impact provisions that occurred within the applicable limitations period. That violation is factually related to earlier acts that might have formed the basis for a suit, but itself constitutes a freestanding legal harm under Title

VII's disparate-impact provisions. Petitioners' EEOC charge was therefore timely under Section 2000e-5(e)(1).

4. Although the court of appeals acknowledged the differences between a claim of disparate treatment and one of disparate impact, it concluded those differences were "not fundamental," Pet. App. 5a, and therefore should not "change the date on which the statute of limitations begins to run," *id.* at 6a. The court reasoned that disparate-impact theory "involves the use of circumstantial evidence to create an inference of discrimination." *Id.* at 5a. It further explained that if a test or other selection device proves to have an adverse impact on a protected group, and the employer cannot show that "the method is a rational method of selecting employees," then the employer's "continuing to use the test suggests that his purpose in doing so may be discriminatory, although that need not be shown." *Id.* at 6a.

As an initial matter, this Court has not held that the sole purpose of Title VII's disparate-impact provisions is to smoke out covert intentional discrimination. As the court of appeals itself explained, "[t]he concept of disparate impact was developed for the purpose of identifying discriminatory situations where, through inertia or insensitivity, companies were following policies that gratuitously—needlessly—*although not necessarily deliberately*, excluded black or female workers from equal employment opportunities." Pet. App. 5a (emphasis added) (quoting *Finnegan* v. *Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992)).

Moreover, as the court of appeals suggested, there may be additional reason to question an employer's conduct when it hires employees based on the results of an invalid employment test than when it initially administers and scores the test (or compiles an eligibility list

based on the scores). An employer may not know immediately after the test is scored whether it has chosen "a rational method of selecting employees." Pet. App. 6a. In this case, for example, the validation study for the July 1995 examination was not completed until October 1996, approximately nine months after the test results were first announced, and five months after respondent first used the examination results to hire a class of firefighter candidates. See Resp. C.A. Reply 22; Def. Reply to Pl. Response to Def. Mot. for Summ. J. Attach. 2, at 2 (Apr. 14, 2000) (Aff. of Patrick J. Rocks). The court of appeals' decision thus has the curious effect of immunizing the likely more troublesome conduct. It would insulate from charge an employer's subsequent hiring decisions based on the test results, even though those decisions are more likely to have been made with full knowledge that the consequence would be the disproportionate—and unjustified—exclusion of certain job applicants on a protected basis.

In any event, to say that Title VII's disparate-impact and disparate-treatment provisions aim at the same goal is not to say that they have the same elements. See *Teamsters*, 431 U.S. at 335 n.15. The "use[]" of an unlawful selection device is a violation of Title VII's disparate-impact provisions, regardless of proof of the employer's intent. 42 U.S.C. 2000e-2(k)(1)(A). And an employer "continu[es] to use [a] test" with an unlawful disparate impact, Pet. App. 6a, each time it "uses" the results of the test to classify applicants and to select employees. If the employer uses the test on one occasion to select employees, it will commit one violation; if the employer uses the test on subsequent occasions to select employees, it will commit subsequent violations. The court of appeals' decision identifies no reason why sub-

sequent uses of an unlawful selection device are not independently actionable under Title VII.

5. Respondent argues (Supp. Br. in Opp. 8) that it would be "perverse" to create a more generous rule for filing disparate-impact charges than for filing disparate-treatment charges. But to resolve this case, this Court need only acknowledge that all charges under Title VII are governed by a single and uniform rule: that the charge is timely if it is filed within 180 or 300 days after the allegedly unlawful practice occurred. See *Morgan*, 536 U.S. at 113.

That rule produces neither a more generous nor a less generous limitations period for disparate-impact cases than for disparate-treatment cases. The rule instead produces, for both, the limitations period that corresponds to the violation alleged. Exactly when the limitations period begins to run will depend in any case on the particular claims at issue. Had petitioners here, for example, alleged that a particular hiring decision resulted from both disparate-impact and disparate-treatment discrimination, the two claims would have accrued at the same time. In any event, that even-handed application of Title VII's charge filing provision may result in different accrual dates, depending on the nature of the plaintiff's claim, is itself unremarkable, as this Court has recognized. See *Lorance*, 490 U.S. at 904-906; cf. *Ledbetter*, 550 U.S. at 640. Different claims alleging different acts to prove different elements naturally may accrue at different times. That simple and inevitable fact provides no reason to read Title VII in a manner contrary to its plain language.

C. Policy Concerns Do Not Justify The Court Of Appeals' Misreading Of Title VII

Respondent argues (Supp. Br. in Opp. 10-11) that the decision below is consistent with Congress's "clear policy choices" in imposing a short limitations period under Title VII. But those very same policy choices support reading the statute, in accordance with its text, to mean that an EEOC charge is timely filed if it challenges a hiring decision based on the results of an invalid test that occurred within the limitations period, regardless of that decision's connection to prior violations.

1. The purpose of Title VII's limitations period is to ensure "the protection of the civil rights laws to those who promptly assert their rights," while protecting employers "from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-257.

The court of appeals (Pet. App. 9a) reasoned that its rule was necessary to avoid the prospect that a plaintiff might wait several years to file a Title VII charge after an employer administers and scores an invalid examination. The question in this case, however, is whether a plaintiff may wait 300 days (or, in some States, 180 days) after an employer uses such examination results to select employees for hire. The selection constitutes a violation of Title VII that sets the clock running, regardless of how much time has elapsed since the administration of the examination.

When a violation has occurred within the statutory limitations period, permitting a plaintiff to prosecute that violation upsets no legitimate "interests in repose and reliance." Supp. Br. in Opp. 11. Staleness concerns generally disappear when suit is brought on a violation within the limitations period. And the usual rule is that

a claimant who challenges a single violation within a related series may not seek remedies for injuries that occurred outside the limitations period. Cf. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (explaining that, in an antitrust case, although "each overt act that is part of the violation and that injures the plaintiff"—for example, each sale in the case of a price-fixing conspiracy—"starts the statutory [limitations] period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times," "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by the old overt acts outside the limitations period") (internal quotation marks and citation omitted).

As a practical matter, candidates for employment or promotion have little incentive to delay filing EEOC charges, and indeed every incentive to bring them promptly. Delay in filing charges would postpone any possibility of attaining the employment opportunities they claim were unlawfully denied them. And this Court explained in *Morgan* that allowing employees to challenge Title VII discrimination "that extend[s] over long periods of time" into the charge-filing period, "does not leave employers defenseless" in the face of "unreasonable and prejudicial delay." 536 U.S. at 121, 122; see *id.* at 121 (noting that "an employer may raise a laches defense" against "employees who bring hostile work environment claims that extend over long periods of time").[5]

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[5] As this Court explained in *Ledbetter*, the short limitations period in Section 2000e-5(e)(1) demonstrates that Congress did not consider laches sufficient to guard against the prosecution of claims of discriminatory acts that occurred outside the limitations period. 550 U.S. at 632. But where discrimination occurs over a long period of time and extends into the charge-filing period, the Court in *Morgan* explained

The possibility of a laches defense not only incentivizes plaintiffs to bring their claims promptly, but also protects defendants who have been disadvantaged by unreasonable delay.

Finally, the passage of time in the context of disparate-impact cases does not raise the same concerns that it does in the disparate-treatment context. While delay may make it more difficult to discern an employer's discriminatory intent in a disparate-treatment case, the pertinent evidence in disparate-impact cases is far less likely to "fade quickly with time." *Ledbetter*, 550 U.S. at 631. Because the employer's motives are not at issue in disparate-impact cases, the "memories of those who made decisions concerning the examination and the eligibility list," Supp. Br. in Opp. 11, are not typically essential to the resolution of the issues. Rather, the evidence in disparate-impact cases "usually focuses on statistical disparities, rather than specific incidents," *Watson*, 487 U.S. at 987, and on the validity of an employment practice that produces such disparities, *id.* at 997-998. Such evidence is likely to be preserved over time. See 29 C.F.R. 1607.4, 1607.5(D), 1607.15 (requiring that employers maintain records concerning the impact and validity of any employment examination that has an adverse impact on the employment opportunities of members of a protected group). Notably, respondent has not suggested that the timing of petitioners' charges in any way affected the resolution of the merits issues in this case. Cf. *Ledbetter*, 550 U.S. 631-632 & n.4 (noting that the plaintiff's disparate-treatment claims "turned

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that laches offers the employer "recourse when a plaintiff unreasonably delays filing a charge." 536 U.S. at 121.

principally on the misconduct" of a supervisor who had died by the time of trial).

2. On the other hand, the court of appeals' rule would permit an employer to continue indefinitely to make hiring decisions based on a concededly unlawful selection device, provided that no plaintiff has filed an EEOC charge within 180 or 300 days of the announcement of the results. That result would severely undermine the purpose of Title VII's disparate-impact provisions, which mandate "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs*, 401 U.S. at 431.

Such a rule would also undermine Congress's preference for voluntary compliance. See *Ricci*, 129 S. Ct. at 2674 (noting that Congress regarded voluntary compliance to be the "preferred means of achieving the objectives of Title VII") (quoting *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 515 (1986)). An employer already immunized from disparate-impact liability for its use of an invalid test with an impermissible disparate impact would have little incentive to develop a new selection device with less of an adverse impact. The safe choice for any employer, under the court of appeals' rule, is to continue to use the test —no matter how stale or skewed the test may be—so long as more than 180 or 300 days have elapsed since the test results have been announced.

The court of appeals' decision, moreover, encourages—indeed, requires—plaintiffs to file charges before facts have crystallized. Determining whether an employment examination has an impermissible disparate impact—that is, whether it both has a disproportionate

adverse impact on a protected basis and is not "job related for the position in question and consistent with business necessity," 42 U.S.C. 2000e-2(k)(1)(A)(i)—often takes some time. This case itself illustrates the point: even the test developer's own validation study was not completed until October 1996—approximately nine months after respondent announced the test results and five months after respondent hired its first class of firefighter candidates. See p. 26, *supra*. Under the decision below, however, a plaintiff may not wait to learn more about the lawfulness of the examination before filing EEOC charges; he must call on the EEOC to investigate at the first available opportunity. See Pet. App. 10a.

Finally, the court of appeals' rule encourages plaintiffs to file charges before they can be sure that an employer's administration of an invalid test will have any practical consequences. An employer that gives an employment examination may never in fact use the results to select employees for hire or promotion.[6] Or the employer may decide, as respondent eventually did in this very case, to hire as well from among the ranks of those adversely affected by the examination. See Pet. App. 9a, 16a. But under the decision below, a Title VII plaintiff cannot afford to wait to evaluate the practical conse-

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[6] Respondent contends that this Court's decision in *Ricci* "sharply limits" an employer's discretion not to use the results of an employment or promotional examination. Supp. Br. in Opp. 7 n.2. *Ricci*, however, concerns only "race-based" decisions not to use examination results. 129 S. Ct. at 2673-2674. There are any number of other reasons an employer might decide not to use the results of an employment or promotional test. *Ricci* would be irrelevant if, for example, the employer no longer has sufficient resources to hire additional personnel or has concerns that the test was improperly administered.

quences of an employment examination before filing a charge with the EEOC.

There is no reason why a potential plaintiff in a disparate-impact case—which by its nature focuses on consequences—should not be able to see, before deciding to file charges, whether and how an employment practice is used to make hiring or promotion decisions. A rule that permits plaintiffs to file within a few months after an employment practice is so used—in accordance with Title VII's language—reduces the chances that plaintiffs will burden employers, the EEOC, and courts with potentially divisive complaints that later prove unnecessary.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2009

AMICUS CURIAE BRIEF

No. 08-974

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR L. LEWIS, JR.; GREGORY S. FOSTER, JR.; ARTHUR C. CHARLESTON, III; PAMELA B. ADAMS; WILLIAM R. MUZZALL; PHILIPPE H. VICTOR; CRAWFORD M. SMITH; ALDRON R. REED; and AFRICAN AMERICAN FIRE FIGHTERS LEAGUE OF CHICAGO, INC., individually and on behalf of all others similarly situated,

Petitioners,

-v.-

CITY OF CHICAGO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR *AMICI CURIAE*, THE CITY OF NEW YORK YORK AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IN SUPPORT OF RESPONDENT

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January 21, 2010

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INTERESTS OF THE *AMICI CURIAE*

Pursuant to Rules 37.4 and 37.6, the City of New York ("the City") and the International Municipal Lawyers Association ("IMLA") submit this *amici curiae* brief in support of respondent seeking affirmance of the judgment of the United States Court of Appeals for the Seventh Circuit in *Lewis v. City of Chicago*, 528 F.3d 488 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 47 (2009) (Pet. App., 1a-11a).[1]

The City, a municipal corporation organized and existing under the laws of the State of New York, has the largest municipal workforce in the country. As of December 31, 2007, the City's workforce under the jurisdiction of the City's Department of Administrative Services ("DCAS") included 190,860 employees serving in competitive class titles. *See* City's Five-Year Plan, www.cs.state.ny.us/commission/EntirePlan.pdf ("*Five-Year Plan*") (last checked January 21, 2010).

IMLA is a non-profit, nonpartisan, professional organization consisting of more than 2,500 members comprised of local government entities, including cities and counties, and

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[1] "Pet. App." refers to the Appendix filed with the petition for a writ of certiorari. Pursuant to Rule 37.6, "no counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation of this brief." Petitioners and respondent have filed a letter of consent for all *amici* briefs with the Clerk of the Court.

subdivisions thereof. IMLA develops and advances solutions to important legal issues faced by local governments and represents their interests through *amicus* filings in this Court and other federal and state appellate courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

State and local governments are, together, the largest group of employers in the nation, providing some 19.3 million of the country's 151.6 million jobs as of 2006 -- nearly 13% of the work force. *See* Rose A. Woods & Eric B. Figueroa, *Industry Output and Employment Projections to 2016*, Monthly Lab. Rev. (Nov. 2007) at 53, 54. Local governments alone employ some 11 million full-time workers and an additional three million part-time workers. U.S. Census Bureau, 2008 Public Employment Data: Local Governments, *see* http://www2.census.gov/govs/apes/08locus.txt (last checked January 20, 2010).

According to the Bureau of Labor Statistics, there is considerable turnover each year. In 2008, local and state governments hired a total of 3.5 million workers, and all but 700,000 were replacements for employees who had departed. At the end of 2008, these state and local governments were faced with over 300,000 job openings to fill.[2]

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[2] *See* Bureau of Labor Statistics, Job Openings and Labor Turnover Survey, http://www.bls.gov/data/#employment (last checked January 21, 2010) (to retrieve data, select the "ones-screen data search" function within the Job Openings and Labor Turnover Survey Database).

On top of these hiring decisions, public employers make countless promotion decisions each year.

In New York, pursuant to the State Constitution, competitive titles must be filled by competitive exams, which are used to create lists of eligible candidates for competitive civil service jobs. In relevant part, Article V, § 6 provides that: "Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; . . .." N.Y. Const. Art. V, § 6. *See also* N.Y. Civ. Serv. Law § 50(1). Just as in New York, throughout this country, a variety of constitutional requirements and state and local civil service laws require governmental entities to fill millions of jobs each year based on competitive examinations, a constraint not faced by private employers.

Pursuant to New York State law and the N.Y.C. Charter, DCAS is the municipal civil service agency responsible for citywide personnel matters and has the powers and duties of a municipal civil service commission, including to "preserve and promote merit and fitness in city employment." *See* N.Y. Civ. Serv. Law, §§ 2(4), 15, 20, 22; N.Y.C. Charter §§ 810-812, 814(a)(2); *see generally Albano v. Kirby*, 36 N.Y.2d 526, 531, 330 N.E.2d 615, 619 (1975). This is similar to other state and local civil service laws, which typically provide for a local civil service board or commission to oversee the examination process. *See, e.g.*, Conn. Gen. Stat. § 7-410.

DCAS is charged with ensuring that all City agencies have the critical resources and support they need to provide the best possible services to the public. DCAS thus supports the City agencies' workforce needs including by ensuring a sufficient number of eligible job applicants through the timely formulation, administration and grading of civil service examinations. *Mayor's Management Report* (Sept. 2009) ("*Mayor's Management Rpt.*") http://www.nyc.gov/html/ops/downloads/pdf/2009_mmr/0909_mmr.pdf, p. 83 (last checked January 21, 2010).[3] Examinations for public safety titles (*e.g.*,

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[3] In addition to administering the civil service system for all City agencies, including the offices of City elected officials, at present, pursuant to statute or case law, DCAS administers the civil service system for several other entities, including the City Department of Education, the New York City Transit Authority, the New York City Triborough Bridge and Tunnel Authority, the New York City Housing Authority and the New York City Municipal Water Finance Authority. *Five-Year Plan*, p. 1. DCAS administers civil service examinations for open competitive, promotional (for current city employees only), licensing, and state titles, as well as notices of examination and applications. *Id.*. Within DCAS, the Division of Citywide Personnel Services has two major operating bureaus:

- The Bureau of Examinations, which is responsible for the classification of titles, and for all examination matters, including test development, test writing, test administration, and test rating;

- The Bureau of Civil Service Administration, which is responsible for the citywide administration of civil service eligible lists and manages the municipal civil service system, including the training of city employees through professional development programs. *Five-Year Plan*, p. 3.

titles in the police, fire and correction services) are the top priority in terms of the City's exam administration. *Five-Year Plan*, p. 6, n.4.

After establishing basic eligibility requirements, DCAS is charged with preparing position-specific examinations to assess each candidate's qualifications for the relevant position. N.Y. Civ. Serv. Law § 61. Thereafter, DCAS establishes an "eligible to hire" list, which consists of all candidates who pass the exam by rank order and is available to each City agency with open positions in the corresponding title. Candidates are contacted for interviews, as the needs of these agencies require. New York State Civil Service Law requires agencies to review the top three scorers remaining on the list for appointment to a vacant position, a procedure known as the One-in-Three rule. N.Y. Civ. Serv. Law § 61.[4]

With respect to promotional examinations, eligibility is limited to persons holding competitive class positions in a lower grade, as far as is practicable, provided these positions are in a direct line of promotion. N.Y. Civ. Serv. Law § 52. Aggrieved applicants typically may challenge the

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[4] Other states have similar requirements. *See, e.g.*, Mich. Comp. Laws Ann. § 38.413 ("Whenever a position * * * is to be filled * * * the commission shall certify the names * * * of the 3 candidates standing highest on the eligible list * * *."); Conn. Gen. Stat. § 7-414 (following preparation of an eligible list, requiring submission of "not more than three applicants having the highest rating"). The appointing authority must then hire or promote applicants from the names provided by the commission. *See, e.g.*, Ohio Rev. Code Ann. § 124.27(B).

examinations before the commission certifies the results. These judicial challenges may involve the test's substance, procedures, or outcomes. *See generally Wood v. Irving*, 85 N.Y.2d 238, 647 N.E.2d 1332 (1995) (appeal in an Article 78 proceeding by police officer seeking appointment as a detective).

Under governing New York law, a list is active for four years. N.Y. Civ. Serv. Law § 56. Generally, a civil service applicant cannot be appointed from an expired list, as such appointment would be a legal impossibility, and may also violate the merit and fitness clauses, which appear in certain state constitutions, such as New York. *See* 15A Am Jur.2d, Civil Service, § 26. However, in New York City, under N.Y. Civ. Serv. Law § 56, a list may be extended by up to one year when there has been a restriction against filling vacancies during the effective period of the list. *Id.* Accordingly, it is conceivable that a list could remain active for as long as five years.

In Fiscal Year (FY) 2009, DCAS administered 143 civil service exams, 133 in FY 2008, 166 in 2007, and 118 in FYI 2006. In FY 2009, the number of applications for civil service exams increased 37.5 percent, due to a 7.5 percent increase in the number of exams administered and a larger than average pool of applicants for certain examines. *Mayor's Management Rpt.*, p. 83 (Bar Chart, "*Civil Service Exams Administered*"). In FY 2009, there were 214,689 applications received for open competitive civil service exams. *Id.*, p. 84 ("*Performance Statistics*" Chart).

The decision in this case will thus affect the hundreds of exams administered annually by DCAS, and the thousands of exams administered annually throughout the country by IMLA members. In addition, the decision will directly affect ongoing litigation in *United States v. The City of New York*, which involves challenges by the United States and the intervenor Vulcan Society to the use of two written examinations administered in February 1999 and December 2002 to establish a rank-order list of applicants eligible for entry-level firefighter positions in the City's Fire Department. *Id.*, 2009 U.S. Dist. LEXIS 5821 (E.D.N.Y. 2009) (Garaufis, D.J.) (*see* discussion, *post*, pp. 17-18).

The significance of this case to employers is beyond question. As in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) ("*Ledbetter*"), this Court should uphold the principles underlying the short statute of limitations period for Title VII disparate impact claims in order to provide needed finality, stability and repose for employers. *Ledbetter*, 550 U.S. at 630-31, citing numerous cases. This need is particularly important for public employers, who may be legally required under state Constitutions, or state and local laws, to use competitive examinations to assess merit and fitness, *see, e.g.*, N.Y. Const., Art. V, § 6, and when the resultant eligibility lists may last for years. *See, e.g.*, N.Y. Civ. Serv. Law § 56 (list last four years, with possible one year extension).

If, as petitioners propose, each hiring decision that is made from a list following competitive examination is subject to a new 300-day limitations period, that essentially results in

an open-ended period where employers are exposed to liability from tests or other employment practices that are nondiscriminatory on their face, but which may have a discriminatory impact. The Seventh Circuit properly applied this Court's precedent in rejecting such a continuing statute of limitations period.

In so doing, it properly looked to the principles articulated in *Ledbetter*, and properly rejected the Second Circuit's stale analysis in *Guardians Ass'n of the New York City Police Dep't v. Civil Service Comm'n*, 633 F.2d 232 (2d Cir. 1980), *aff'd on Title VI issue*, 463 U.S. 562 (1983), *cert. denied*, 463 U.S. 1228 (1983) (denying *certiorari* on Title VII issue) (*see* discussion *post*, pp. 16-19). Indeed, both the Sixth Circuit and Third Circuit have previously rejected a continuing violation theory with respect to disparate impact claims arising from challenges to appointments from eligible lists. *See, e.g., Cox v. City of Memphis*, 230 F.3d 199, 205 (6th Cir. 2000) ("To allow employees to challenge an eligibility roster during the entire time it is used would be to create substantial uncertainty for employers who have to make important staffing considerations given that many rosters are intended to be used for several years after they are promulgated."); *Bronze Shields, Inc. v. New Jersey Dept. of Civil Service*, 667 F.2d 1074 (3d Cir. 1981).

In addition, the practical consequences of the legal standard proposed by petitioners would adversely affect safe and fully functioning municipal workforces. Under *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) ("*Ricci*"), public employers,

particularly cities which give competitive examinations for their uniformed police and firefighter services, will be forced, unless there is a strong basis in evidence, to use tests required by state Constitutions and laws, as well as this Court, yet be doomed to protracted litigation the moment they receive the test results. However, the operational needs of the municipal workforce require that there only be a limited period, as Congress enacted, for such challenges. In this regard, following this Court's lead in *Ledbetter*, the Seventh Circuit employed a reasoned analysis of the statute and this Court's precedent in holding that the City of Chicago should not be responsible for "continuing violations" or, in essence, an open-ended statutory limitations period.

In sum, *amici* public employers have a strong interest in the recognition of a legal standard that upholds the principle of timely filing of disparate impact challenges to civil service examinations from the date the list is established, or, solely in the alternative, the date of notice of the results. Such examinations and the resulting hiring therefrom are the lifeblood for the efficient functioning and operation of government, which needs the finality and the certainty and repose that finite statutes of limitations bring. This is especially important to ensuring a stable workforce to maintain the services, security and well being of cities in these difficult economic and troubled times. Contrary to petitioners' position, such challenges should not go on for protracted periods.

ARGUMENT

IN ACCORD WITH THIS COURT'S PRECEDENT, THE PRINCIPLES UNDERLYING CIVIL SERVICE MERIT AND FITNESS REQUIREMENTS AND THE PRINCIPLES UNDERLYING THE SHORT STATUTE OF LIMITATIONS PERIOD FOR TITLE VII ACTIONS, THERE SHOULD BE AN AFFIRMANCE.

A. Civil Service Merit and Fitness Requirements Prevail In Government Hiring.

A brief history of the civil service process shows origins stemming from China, by use of meritocratic examinations to select government officials in the Han dynasty. *See* Discovery Channel website, "Ancient China—Dynasties-Han Dynasty," http://www.yourdiscovery.com/ancient_china/dynasties/han/index.shtml (last checked January 15, 2010). The primary purpose then, as now, is to have a hiring system based on merit and fitness so that government can run efficiently and to deter corruption and systems based upon political or social influence or favoritism. *See generally* Vol. 3 McQuillan Mun. Corp., § 12.55 ("Civil service commission.") (3d ed.).

In this country, the development of the federal civil service and the federal Civil Service Commission substantially began with the enactment of the Pendleton Civil Service Reform Act in 1883. *See* Civil Service (Pendleton) Act, ch. 27, 22 Stat. 403 (1883); *see also Developments in the*

Law, Public Employment, 97 Harv. L. Rev 1611 (1984).[5] The law was passed after the assassination of President James Garfield, who was shot by a disgruntled seeker of a government job. *See Guiteau's Case*, 10 F. 161, 173 (D.D.C. 1882). The law replaced the former "spoils" system, with its abuses and corruption in government employment, with a system based on merit. *See, e.g.*, *State Government 14*, State of New York Temporary State Commission on the Constitutional Convention (1967), at 209.

In 1884, New York became the first of the states to adopt a constitutional provision, largely modeled on the Pendleton Act. *Id.* at 208-209, citing N.Y. Const., Art. V, § 6 (reproduced *ante*, p. 3). *See generally* Peter J. Galie, "*Ordered Liberty A Constitutional History of New York*," p. 165 (Fordham Univ. Press, 1996). *See also Seeley v. Stevens*, 190 N.Y. 158, 82 N.E. 1095 (1907) (the purpose of the civil service provision is to improve the standard of those holding subordinate positions in the public service and to terminate the vicious practice which had grown up of changing employees with every change in the appointing power); *Problems Relating to Executive Administration and Powers*, Report of the New York State Constitutional Convention Committee, 1938, pp. 170-79. Subsequently, Massachusetts became the

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[5] Following the Civil Service Reform Act of 1978, two agencies, the Office of Personnel Management and the Merit Systems Protection Board, replaced the Civil Service Commission. *See* 5 U.S.C. §§ 1101 & 1201 *et seq.*.

second state, followed by many other states and localities.[6]

Today, such provisions cover a majority of state and local government employees, whether constitutional, such as in New York, statutory or by local ordinance. *See* Osborne M. Reynolds, Jr., *Local Government Law* 303 (2d ed. 2001). By 1960, three-fourths of cities with populations over 10,000 had adopted a merit-based hiring and promotion system, including all cities with populations of at least a quarter million. *Id.*

Underlying these systems is the fact that governments provide a myriad of services, from maintenance of roads to sanitation to social services, and also security in the form of police and fire protection. As stated by one commentator, "... the quality of the services that any government provides is going to depend on the quality of the employees providing it . . . . There is no more important area of public administration than personnel and there may be no more important function of government than personnel administration." Jonathan Walters, Senior

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[6] *See* Massachusetts Civil Service Act, 1884 Mass. Acts 346, 1-2, cited in Note, Daniel D'Isidoro, "*The Massachusetts Civil Service Law: Is it Necessary to Destroy the Current System in Order to Save It?*," 40 New Eng. L. Rev. 1103 (Summer 2006); *see also* N.J. Const. Art. VII, § 1 ("Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained * * * by examination, which * * * shall be competitive."); Ohio Const. Art. XV, § 10; Iowa Code Ann. §§ 400.1, 400.8-400.9; Conn. Gen. Stat. § 7-407 *et seq.*; New Haven, Conn., Code Art. XXX.

Correspondent, Governing Magazine, Address at a Pioneer Forum (Sept. 20, 2000), in Policy Dialogue, Nov. 2000, available at http://www.pioneerinstitute.org/pdf/pdialg_37.pdf (last checked January 17, 2010).[7]

B. Where Millions Of Hiring And Promotion Decisions Each Year Turn On Merit-Based Criteria, Principally Competitive Examinations, Principles of Finality and Repose Should Be Applied in Rejecting Untimely Disparate Impact Challenges.

While merit-based employment criteria may violate Title VII's disparate impact principles, *see, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court has also recognized the importance of timely challenges under Title VII recognizing that statutes of limitations serve the important policies

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[7] In New York City alone, the scope of governmental services provided is enormous. To administer the City, with its over 8 million resident population, as well as an additional multi-million daily non-resident population, is a task of great magnitude. The City is approximately 320 square miles with approximately 6,000 miles of roads, which must be paved and constantly repaved, cleaned, lighted, policed and regulated with signs. Over 1.1 million children attend some 1600 schools, which are maintained and staffed by City personnel, while there are approximately 7894 uniformed sanitation workers and 2041 civil employees. The Fire Department employs 11,275 uniformed personnel, 3,071 Emergency Medical Services and 1,678 civilian personnel. A police force of over 38,000 is employed to protect the City. *See generally* Official New York City Website, http://www.nyc.gov/portal/site/nycgov/?front_door=true (website leads to specific agency sites, last checked January 21, 2010).

of finality and repose. *Ledbetter*, 550 U.S. at 630, citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554-55 (1974). As this Court reiterated in *Ledbetter*, 550 U.S. at 630, they: ". . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *Ledbetter*, 550 U.S. at 630, quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quotation omitted).

As this Court further held (550 U.S. at 630-31):

> The EEOC filing deadline "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks*, [449 U.S. 250, 256-257 (1980)]. Certainly, the 180-day EEOC charging deadline, 42 U.S.C. § 2000e-5(e)(1), is short by any measure, but "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). This short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation [citations omitted].

This Court also rejected the argument that employers would be protected by the equitable doctrine of laches. Instead, Congress had taken "a diametrically different approach, including in Title VII a provision allowing only a few months in most cases to file a charge with the EEOC. 42 U.S.C. § 2000e-5(e)(1)." *Ledbetter*, 550 U.S. at 632.

Ultimately, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco*, at 826. By operation of 42 U.S.C. §§ 2000e-5(e)(1) and 2000e-5(f)(1), a Title VII "claim is time barred if it is not filed within these time limits." *Ledbetter*, 550 U.S. at 632 (citations omitted). Accordingly, the *Ledbetter* Court "reject[ed] the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period." *Id.*, 550 U.S. at 632. Rather, "A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects of past discrimination." *Id.* at 632. *See also Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).[8]

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[8] The specific holding in *Lorance* was superseded by statute in 1991, which expanded the scope of protection. *See* 42 U.S.C. § 2000e-5(e). Last year, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (codified as amended at 42 U.S.C. § 20000w-5(e)(3)), to expand, once again, the scope of protection.

See also Cox v. City of Memphis, 230 F.3d 199, 204 (6th Cir. 2000) (reviewing the few cases challenging appointments from eligible lists, including *Guardians*, and opining that the "better view is that promotion or hiring from an allegedly tainted promotions roster is not a "continuing act," but is merely the effect of previous discrimination"; "To allow employees to challenge an eligibility roster during the entire time it is used would be to create substantial uncertainty for employers who have to make important staffing considerations given that many rosters are intended to be used for several years after they are promulgated"); *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 534 (5th Cir. 1986) (stressing policy consideration that "courts must be careful not to expose upon employers a virtually open ended period of liability" and that employers should not be faced with substantial uncertainty in making important staffing decisions, especially where lists may be used for a period of years); *see also Bronze Shields*, *supra*.

In contrast, in *United States v. City of New York*, the District Court denied the City's motion for partial dismissal of certain claims in the Vulcan intervenors' complaint on timeliness grounds by employing a continuing violation theory. *Id.*, 2009 U.S. Dist. LEXIS 5821.[9] Thus, despite this Court's

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[9] The list resulting from the February 1999 examination, No. 7029, was used for the period from February 2001 until December 2004; subsequently, the list resulting from the December 20002 examination, No. 2043, was used from May 2004 through January 2009. After the January 2009 decision denying the motion to dismiss, in July 2009, the District Court denied the City's motion for partial summary judgment, (*footnote continues on next page*)

decision in *Ledbetter*, and the Seventh Circuit's decision in this case, the District Court looked back to the Second Circuit's 1980 decision in *Guardians*, wherein the Circuit rejected the City's position that the operative event in the hiring procedure was the promulgation of the eligibility list and that the Department's refusals to hire minorities were merely effects of earlier discriminatory conduct. *Id.*, 633 F.2d at 248, 251.

Based on Ledbetter and all of the above, *amici* urge that the filing period for challenging an examination based upon disparate impact begins to run upon the establishment of the eligibility list or, at a minimum, the date on which test-takers get notice of the examination results.

Indeed, the need for stability in municipal workforces and the ability to fill positions as quickly as possible is self-evident given the vast scope of ongoing services, particularly the critical needs in the uniformed services of police and fire

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and granted plaintiffs' motion for similar relief. *See United States v. The City of New York*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009). The parties have recently briefed the scope of the remedial relief for the disparate impact claims and that issue is *sub judice* (*see* discussion, *post*, Sub. C). On January 13, 2010, the District Court issued a separate order granting a motion for summary judgment filed by the Vulcan Society on the four remaining claims, disparate treatment in violation of Title VII, intentional discrimination, in violation of the equal protection clause and 42 U.S.C. § 1981, and, separately, in violation of city and state human rights laws; and disparate impact in violation of the human rights laws. *See United States v. The City of New York*, 2010 U.S. Dist. LEXIS 2506 (E.D.N.Y. 2010).

protection. As noted above, *ante*, pp. 2-7, localities and states make millions of hiring decisions each year based on competitive examinations required to meet legally imposed merit and fitness requirements. Moreover, there are lengthy time frames involved in devising exams and establishing lists, particularly in large cities such as New York and Chicago.

Any extension to the time frame for a disparate impact challenge to the establishment of an eligible list would wreak havoc with efficient government operations and provision of services. It would also greatly increase the costs of such services at a time when state and local budgets are increasingly precarious.

As but one example, in 1986, N.Y. Civ. Serv. Law § 50-a, was passed, a portion of which is specifically geared to the City and its need for an effective in-place workforce, by limiting the time frame for individual challenges to the correctness of answers on examination. The supporting legislative memorandum urges the need for more efficient and effective personnel administration, resulting in more orderly promotions, thereby benefiting the City and the test takers (*see* L. 1986, c. 7830, Memorandum of Legislative Representative of the City of New York, 1986 McKinney's Session Laws of New York, p. 3000).

It states, in relevant part (*id.* at p. 3000):

> In recent years there has been a great deal of litigation arising out of civil service promotional examinations. This litigation cripples

> the administration of the civil service system and makes the orderly promotion of members within that system virtually impossible. In the City of New York, this is particularly true in the Police and Fire Departments, where almost every examination is subject to lengthy challenges. The litigation creates uncertainty about who is entitled to promotion. It often drags on for years with lower courts often reversing the personnel director's decisions and higher courts reversing the lower courts. Hanging over this litigation is the constant threat that appointments to jobs, including public safety jobs, will be enjoined.

In this regard, DCAS devises and administers hundreds of competitive examinations each year in a vast array of titles. The sheer numbers of exams to be designed, administered, and graded, and the time frames involved in this process and resultant legal challenges threaten to undermine the ability of government to perform the vast array of services needed.

Moreover, for certain tests, in major cities, there are thousands and thousands of applicants. For example, in this case, for the challenged, City of Chicago firefighter test, there were 26,000 applicants and, for the most recent 2007 New York City firefighter exam, there were 30,000 applicants. At the same time, this Court is acutely aware that police and fire protection are paramount goals in

today's climate of enormous concern about security and the need to be fully staffed for exigencies.

It is beyond question that the City and other municipalities are eager to comply with their anti-discrimination obligations under the law as well as to comply with the legally required merit hiring processes. However, corresponding to a government employer's need for finality and stability in its workforce, is the unfortunate reality that there is a growing belief that employers may not be able to devise any competitive written examination that will withstand scrutiny for disparate impact challenges, whether they employ outside consultants or not. The dissenting opinion in *Ricci* starkly recognizes this fact. *Ricci*, 129 S.Ct at 2703-4 (Ginsburg, J., dissenting) (opining that reliance on written tests for the position of fire officer is "questionable to say the least" and further opining that "the qualities required for such position are not well measured by written tests").

Even in 1967, when the New York State Constitution was revised, the Temporary State Commission recognized that the use of competitive written examinations had been particularly detrimental at professional and managerial levels. The Commission emphasized: "It is difficult to devise written examinations which measure the skills, judgment and character required for higher positions." *See* State of New York Temporary State Commission on the Constitutional Convention (1967), *State Government 14*, at 213.

Furthermore, while some commentators have suggested that there are alternative preferable tests, such as assessment centers, that

type of test is impossible for large employers who may have thousands and thousands of applicants for positions such as entry-level firefighters. For example, for the most recent firefighter test given by the City in 2007, there were close to 30,000 applicants and the written test was administered to over 22,000 candidates. Moreover, such alternative type tests have other drawbacks, which make them impossible for use for large numbers, including issues of maintaining the integrity of the test and the time involved for personal administration.

Faced with the *Ricci* decision, moreover, employers are faced with a difficult situation of being in a no-win situation with regard to hiring from established civil service lists following competitive examinations. The reality is that municipalities will bear the burden of litigation in virtually every case in which there is a dispute, with such disputes running over many years even if employers may eventually prevail. *See, e.g., Lewis*, 528 F.3d 488 (involving over eleven years of litigation over the fire department's hiring plan).

In this regard, the sheer number of exams that must be given compounds the enormous rising litigation costs, which are magnified in light of State and local budget shortfalls due to ongoing recent economic downturns and budget pressures. As IMLA previously described in its *amicus* brief in *Ricci*, "States face a budget shortfall of billions of dollars –as much as 17% of their ordinary budgets—now, a shortfall projected to get worse in the next two fiscal years." Brief of *Amicus* IMLA in *Ricci v. DeStefano*, dated March 25, 2009, 2009 U.S. S. Ct. Briefs LEXIS 267. *See also* Elizabeth

McNichol & Nicholas Johnson, Ctr. On Budget & Policy Priorities, *Recession Continues to Batter State Budgets; State Responses Could Slow Recovery* at 1 (updated Dec. 18, 2009), http://www.cbpp.org/files/9-8-08sfp.pdf (last checked January 15, 2010) ("The worst recession since the 1930s has caused the steepest decline in state tax receipts on record. As a result, even after making very deep cuts, states continue to face large budget gaps").

The aggregate state budget shortfall is estimated to be at least $350 billion through fiscal year 2011. *Id.* In response to these extreme budget pressures, 83% of cities have cut expenditures and services; 69% have already laid off employees. Chris Hoene, Nat'l League of Cities, Research Brief on America's Cities, Issue 2009-1, *Fiscal Outlook for Cities Worsens in 2009* at 1 (Feb. 2009).[10]

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[10] In New York City, there is a projected $4 billion deficit gap and economic conditions continue to worsen, with tax revenues continuing to decline sharply. *See* Press Release (PR) 051-09, "*Mayor Bloomberg presented his Fiscal Year 2010 Preliminary Budget*" (January 30, 2009), http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2009a%2Fpr051-09.html&cc=unused1978&rc=1194&ndi=1. More recently, Governor Paterson has taken such measures as withholding a portion of the budget to localities, including the City, and predicting more deficits ahead. *See* State of the State Address 2010, Governor David A. Paterson, *and* Press Release, http://www.state.ny.us/governor/keydocs/speech_0106101.html;http://www.budget.state.ny.us/pubs/press/2010/pressRelease10_eBudget01.html (summarizing the Executive 2010-11 Budget including proposals as to the $7.4 billion budget gap).

Furthermore, while the lawsuits proceed, a local government may be precluded from filling the affected positions, which has significant adverse effects on the delivery of important public services. In any event, as this Court is well aware, it is simply not a viable solution to stop filling vacancies while the use of a list is being litigated. Moreover, the protracted periods of confusion that ensue for government employers and employees when ongoing hiring and promotion decisions are being challenged impairs effective management and provision of services.

For all of the above, reasons, therefore, the Seventh Circuit's recognition that the statute of limitations cannot be reopened with every single hiring or promotion decision from an eligible list is correct. It promotes the effective provision of public services and efficient government operations.

C. There Are Many Difficult Remedial Relief Issues Arising From An Open-Ended Statute of Limitations.

Aside from the uncertainty and disruption which is caused by employing a continuing violation theory and the consequent open-ended liability for employers, another important problem is that the remedial relief process is increasingly difficult. In the relief phase, putting aside the relatively discrete act of quantifying money damages, a court must engage in an extremely detailed fact-intensive inquiry to identify victims of the discriminatory practice for the purpose of making appointments and awarding competitive seniority. Such an individualized inquiry must be cognizant of the innocent non-victims, who will

inevitably be affected by any change in their competitive seniority, and therefore any injunctive relief must be narrowly tailored to minimize the impact on such innocent non-victims.

As this Court explained in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-72 (1977):

> The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, "recreate the conditions and relationships that would have been had there been no" unlawful discrimination. *Franks*, 424 U.S., at 769. This process of recreating the past will necessarily involve a degree of approximation and imprecision. Because the class of victims may include some who did not apply for line-driver jobs as well as those who did, and because more than one minority employee may have been denied each line-driver vacancy, the court will be required to balance the equities of each minority employee's situation in allocating the limited number of vacancies that were

> discriminatorily refused to class members.
>
> Moreover, *after the victims have been identified and their rightful place determined, the District Court will again be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrong doing* (emphasis added).[11]

Indeed, in the case the City is now litigating, *United States v. The City of New York*, following its decision on Title VII liability against the City, the District Court is considering the scope of the

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[11] *See also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 578-79 (1984) (citations omitted) ("mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him. Even when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a nonminority employee laid off to make room for him. He may have to wait until a vacancy occurs, and if there are non minority employees on layoff, the court must balance the equities in determining who is entitled to the job; *Evans v. Evanston*, 881 F.2d 382, 385-86 (7th Cir. 1989), *cert. denied*, 505 U.S. 1219 (1992) ("While there is much talk in the cases about 'make whole' relief, this talk has reference to cases where it is reasonably clear that, had it not been for the discriminatory behavior, the plaintiff would have got (or retained) the job or other employment benefit in issue, and where making the plaintiff whole would not unduly injure innocent third parties.") (citations omitted); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976).

appropriate remedial relief. In so doing, it has again denied a motion by the union, the Uniformed Firefighters' Association ("UFA"), to intervene, unless the UFA provides a further explanation as to why it should be permitted to take a position which favors one group of members over the others. *United States v. The City of New York*, 2009 U.S. Dist. LEXIS 88467 (E.D.N.Y. 2009).

Specifically, the UFA claimed an interest in relation to retroactive competitive seniority that may be implicated in the remedial order. The UFA asserted that: "If successful, persons granted the retroactive seniority could, in effect, leap-frog over incumbents who have actually served as firefighters for the full term of their seniority claim. Such incumbents could, therefore, be denied promotion or suffer a significant delay in moving to a higher rank. Similarly, the ability of incumbents to transfer to more desirable fire companies or to obtain higher paying special assignments could be adversely affected"; it also asserted that it has "an interest relating to issues of safety and firefighter age that might be implicated by a remedial order" as well as issues of safety and firefighter age. *Id.*

By recognizing the need for a concrete short statute of limitations from the time an eligibility list is established, this Court will help ensure a stable workforce and minimize the difficulties in shaping remedial relief which is fair to all concerned.

CONCLUSION

For all of the above reasons, and those stated in the City of Chicago respondent's brief, employers need finality with respect to disparate impact challenges to competitive examinations required by law, and the certainty and repose that the short statute of limitations brings. This is especially important to ensuring a stable efficient workforce to maintain the security and well being of cities in these difficult economic and troubled times. Accordingly, the City and IMLA urge affirmance of the Seventh Circuit's judgment dismissing the action on grounds of untimeliness.

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AMICUS CURIAE BRIEF

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IN THE

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ARTHUR L. LEWIS, JR., *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 08-974

ARTHUR L. LEWIS, JR., *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council and the National Federation of Independent Business Small Business Legal Center respectfully submit this brief as *amici curiae*.[1] The brief supports the position of Respondent before this Court in favor of affirmance.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the legal and practical considerations relevant to interpreting and complying with workforce nondiscrimination requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business Small Business Legal Center, a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business advocacy association, representing members in Washington, DC and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide. As the legal arm of NFIB, the Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting

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fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

All of EEAC's, and many of NFIB's, members are employers subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. (Title VII), and other federal employment-related laws and regulations. As employers, and as potential defendants to claims asserted under these laws, *amici* have a substantial interest in the issue presented in this case regarding the applicable timeframe for filing an administrative charge alleging disparate impact discrimination under Title VII.

EEAC and NFIB seek to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of their experience in these matters, *amici* are well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

In July 1995, the City of Chicago administered a newly-developed written test to approximately 26,000 applicants for the position of firefighter. Pet. App. 14a-16a. After the test was scored, applicants were placed into one of three categories. Those scoring 89 or above were placed in the "well-qualified" category, and those with scores between 88 and 65 were ranked "qualified." All others were ranked "not qualified." Pet. App. 19a-22a.

On January 26, 1996, the City informed each test-taker individually of his or her score and category.

Pet. App. 22a-23a. Applicants who fell within the "well-qualified" category were told that they would be selected for employment in random order, depending on the City's hiring needs. Pet. App. 22a. Those on the "qualified" list were notified that although their names would remain on the eligibility list, they were not likely to be hired because of the large number of test-takers who achieved a "well qualified" designation. Pet. App. 22a-23a. Test-takers falling onto the "not qualified" list were informed that they had failed the test and would not receive further consideration. Pet. App. 22a.

That same day, the City "issued a press release detailing the results of the exam, including its disparate impact on minority applicants." Pet. App. 23a. The City's mayor publicly expressed regret that the new selection procedure had produced "disappointing" results in the City's efforts to improve diversity, noting that roughly 75% of the 1,782 test-takers deemed "well qualified" were white, compared to only 11.5% who were African-American—even though whites only represented 45%, and blacks represented 37%, of the applicant pool. Pet. App. 2a; J.A. at 54. The test results and impact on African-American test-takers were examined in the local media for several weeks. J.A. at 55-96.

In April 1996, several Petitioners and a group representing black Chicago firefighters met with an attorney regarding possible litigation against the City based on the test results. Pet. App. 48a-49a. Counsel for the group spent the following year reviewing "technical information from the City regarding the test's development and validation," Pet. App. 23a, and on March 31, 1997—approximately 420 days from the date on which the City notified the

test-takers of their individual scores and selection prospects—filed the first of several EEOC charges alleging disparate impact discrimination in violation of Title VII. Pet. App. 49a. On September 9, 1998, after receiving right-to-sue notices from the EEOC, Petitioners filed suit in the U.S. District Court for the Northern District of Illinois alleging Title VII disparate impact discrimination. *Id.* The suit later was certified as a class comprised of the approximately 6,000 African-American test-takers who were included in the "qualified" category. *Id.*

The City moved for summary judgment, arguing that Petitioners failed to file an EEOC charge within 300 days of being notified of their placement in the "qualified" category of the eligibility list. Pet. App. 45a, 52a. In response, Petitioners claimed that the City's "ongoing refusal to process [their] firefighter applications" amounted to a continuing violation "'because 'it is rooted in a discriminatory policy or practice.'" Pet. App. 52a. The district court accepted Petitioners' characterization of the case as one involving a continuing violation, and thus denied the City's summary judgment motion. It said:

> [P]laintiffs are not alleging any individualized adverse treatment by the City. Rather, they allege that the *1995 examination* had a disparate impact on African-American firefighter candidates, and that the City's reliance on the examination's results continues to have a disparate impact on African-American candidates. The City cannot simply explain away the disparate impact of the hiring process as 'the present consequences of a one-time past violation.' If plaintiffs establish that the City's examination had a disparate impact on African-American

> candidates, then the City's ongoing use of the examination's results—rather than some other, non-discriminatory criteria for candidate selection—has the same disparate impact.

Pet. App. 60a (emphasis added) (citation omitted).

The case proceeded to a bench trial, which resulted in a finding of liability against the City for unlawful disparate impact discrimination. The district court rejected the City's proffered business necessity defense—which included evidence that its test validation expert, Dr. James Outtz, issued a report after the test was administered confirming that the test was valid. Pet. App. 12a-43a.

The City appealed the timeliness issue to the Seventh Circuit, which reversed. It held that the Petitioners' claim was untimely because they failed to file an EEOC charge within 300 days of having received notice of their test scores and placement on the "qualified" hiring list. Pet. App. 11a. Relying on this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), which recently was reaffirmed in *Ledbetter v. Goodyear*, 550 U.S. 618 (2007), *superseded by statute*, Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009), the Seventh Circuit concluded that the City's eventual selections of "well-qualified" applicants "was the automatic consequence of the test scores rather than the product of a fresh act of discrimination." Pet. App. 3a-4a.

Although *Ricks* and *Ledbetter* both addressed the filing limitations period applicable to disparate *treatment* discrimination claims, the Seventh Circuit found that the difference between the disparate treatment and disparate impact theories of liability under Title VII "is not fundamental." Pet. App. 5a.

It thus declined to join those circuits that have applied a different charge filing limitations rule to disparate impact cases.

Furthermore, the Seventh Circuit found, the City's actions did not involve a continuing violation, that is, "a series of acts by a prospective defendant [that] blossoms into a wrongful injury on which a suit can be based." Pet. App. 8a. Rather, the plaintiffs "were injured, and their claim accrued, when they were placed in the 'qualified' category of the hiring list on the basis of their score in [sic] the firefighters' test; for that categorization delayed indefinitely their being hired." Pet. App. 9a. Applying the "continuing violation" theory to this case "would have ludicrous consequences," the Seventh Circuit said, including permitting claims to be brought years after the challenged employment action occurs. *Id.*

The Petitioners filed a petition for writ of certiorari, which this Court granted on September 30, 2009.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, (Title VII), makes it unlawful for an employer to discriminate in the terms, privileges or conditions of employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1). The statute prohibits intentional discrimination, as well as unintentional discrimination having an impermissible adverse impact on a statutorily-protected group. *Ricci v. DeStefano*, 557 U.S. ___, 129 S. Ct. 2658, 2672 (2009); 42 U.S.C. § 2000e-2(k)(1)(A); *see also Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The Petitioners are African-Americans who took an employment test administered by Respondent City of Chicago for the position of firefighter. They claim that the test had an adverse impact on African-Americans and that Respondent's use of the test results to categorize test-takers as "well qualified," "qualified," or "not qualified" violated the disparate impact provision of Title VII. Yet it is undisputed that they failed to file a charge of discrimination with the EEOC within 300 days, as required by the statute, of being informed of their test scores and placement in the "qualified" category of the hiring eligibility list—which rendered their employment prospects unlikely, given the large number of applicants falling within the "well qualified" category. Accordingly, Petitioners are jurisdictionally barred from pursuing their action in court and the Seventh Circuit below thus properly remanded the case for entry of judgment for the Respondent.

Although Petitioners urge this Court to do so, Title VII's statutory charge filing limitations provision simply does not draw any distinction between claims of discrimination brought under a disparate treatment theory and those asserting unlawful disparate impact. Rather, Section 42 U.S.C. § 2000e-5(e) merely states that a charge "shall be filed within one hundred and eighty days after the alleged unlawful employment practice . . . ." 42 U.S.C. § 2000e-5(e)(1). Because there is no support in the text of Title VII for applying a different, more generous charge filing period to disparate impact claims than exists for disparate treatment claims, this Court should decline the Petitioners' invitation judicially to do so.

Furthermore, the decision below comports with well established Title VII principles that this Court

has reaffirmed time and again, beginning with *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), and ending most recently with *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Specifically, the Court consistently has held that the lingering consequences of unchallenged past acts have no legal effect under Title VII. While Petitioners contend that their delay in filing administrative charges was permissible, as this Court has made clear, discrete acts of discrimination must be filed within 300 days of when they occurred. Since the use of an employment test having adverse impact is a discrete act, not one of a continuing nature subject to *Morgan*'s expanded Title VII charge filing periods, Petitioners' failure to file within 300 days of learning of the test results proves fatal to their lawsuit. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Finally, expanding the statutory timeframe within which Title VII disparate impact charges must be filed with the EEOC would undermine important policy aims and principles of Title VII and would impose substantial burdens on employers required to defend stale claims. In addition, it would create unnecessary inconsistency in how the statute is enforced by the EEOC and the courts.

ARGUMENT

I. BECAUSE PETITIONERS FAILED TO FILE A CHARGE WITHIN 300 DAYS OF OBTAINING THEIR TEST SCORES AND HIRING ELIGIBILITY RANKINGS, THEY ARE JURISDICTIONALLY BARRED FROM PURSUING THEIR TITLE VII DISPARATE IMPACT CLAIM IN COURT

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (Title VII), makes it an unlawful employment practice to "limit, segregate or classify" applicants for employment in a manner that would "deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(2). The statute prohibits not only intentional discrimination, but also "in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci v. DeStefano*, 557 U.S. ___, 129 S. Ct. 2658, 2672 (2009); 42 U.S.C. § 2000e-2(k)(1)(A); *see also Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Title VII is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), which is authorized to receive and investigate written charges alleging violations of the Act. 42 U.S.C. § 2000e-5. As this Court has observed, the statute "sets forth 'an integrated, multistep enforcement procedure' that . . . begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977)) (footnote omitted). The filing of an administrative charge of

discrimination with the EEOC thus is a "jurisdictional prerequisite[ ] that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), *abrogated by 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009).

A. The Plain Text Of Title VII Requires That A Charge Of Discrimination Be Filed Within 180 Or 300 Days Of The Alleged Unlawful Discriminatory Practice

Title VII requires that any aggrieved person alleging a violation of the Act file an EEOC charge of discrimination within one hundred and eighty days after the alleged discriminatory act occurred, 42 U.S.C. § 2000e-5(e)(1), except where the individual has filed a discrimination charge with a state or local enforcement agency with authority to grant or seek relief, in which case he or she has "three hundred days after the alleged unlawful employment practice occurred" to file an EEOC charge. *Id.* The statutory charge filing limitations period for Title VII claims accrues from the date of the "alleged unlawful employment practice," *id.*, which in the case of a "discrete" act (such as, for instance, a refusal to hire) is the date on which the act "occurred" or "happened."[2] *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 113 (2002).

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[2] *Morgan* distinguished hostile work environment claims from claims involving "discrete" acts, explaining that a hostile work environment generally involves repeated conduct that occurs over a period of time—perhaps even years. *Morgan* at 115. While a single act may not be sufficient to support a claim of hostile environment discrimination under Title VII, so may, the Court said, the cumulative total. *Id.* Therefore, it interpreted

B. Title VII's Statutory Limitations Provision Draws No Distinction Between Claims Of Discrimination Brought Under A Disparate Treatment Theory And Those Based On Alleged Disparate Impact

Section 2000e-5 of Title VII provides that the EEOC is "empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section [2000e-2 or 2000e-3] of this title." 42 U.S.C. § 2000e-5(a). Disparate impact discrimination under Title VII, while first recognized by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was not expressly included in the statute until it was amended by the Civil Rights Act of 1991. Section 2000e-2 now specifies:

> An unlawful employment practice based on disparate impact is established under this title only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity.

42 U.S.C. § 2000e-2(k)(1)(A)(i). As this Court observed in *Ricci*, "[t]hat provision is now in force *along with the disparate-treatment section* already noted." *Ricci*

Title VII as giving individuals 180 or 300 days from *any* act that forms part of the hostile environment claim to file an EEOC charge of harassment. *Id.* at 117-18.

v. DeStefano, 557 U.S. ___, 129 S. Ct. 2658, 2673 (2009) (emphasis added).

Title VII does not differentiate between disparate treatment and disparate impact claims with regard to the manner and timing for submission to the EEOC of a discrimination charge. Rather, Section 42 U.S.C. § 2000e-5(e) merely states:

> A charge *under this section* shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge . . . shall be served upon the person against whom such charge is made within ten days thereafter . . . .

42 U.S.C. § 2000e-5(e)(1) (emphasis added). Because both the disparate impact and disparate treatment provisions appear in Section 2000e-2, which as noted above is expressly incorporated by reference into Section 2000e-5, charges of discrimination asserting either theory plainly must be filed with the EEOC within 180 days (or 300 days, as the case may be) of the date on which the alleged unlawful employment practice occurred. Any suggestion to the contrary is completely unfounded.

In 2009, Congress amended Title VII to extend the time period for bringing a claim of unlawful compensation discrimination under the Act. The Ledbetter Fair Pay Act (Fair Pay Act) provides:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, *or when*

> *an individual is affected by application* of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

42 U.S.C. § 2000e-5(e)(3)(A) (emphasis added). The Fair Pay Act also extends the time period for bringing a compensation discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. § 626(d), Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 *et seq.* The Fair Pay Act thus permits those alleging compensation discrimination to file an EEOC charge within 300 days of receipt of a paycheck or other form of compensation that carries forward the effects of past discriminatory compensation practices, whether or not the discrimination actually occurred within the statutory charge filing limitations period.

The fact that Congress specifically amended Title VII to provide compensation discrimination plaintiffs with an expanded window for filing timely EEOC charges based on the "effects" of past, otherwise untimely acts, further undermines Petitioners' contention that a disparate impact discrimination claim subject to Section 2000e-5(e)(1) "accrues from the time the impact is felt," Brief for the United States as *Amicus Curiae* Supporting Petitioner at 10, rather than from the date the injury occurred. Furthermore, since they allege unlawful disparate impact of an employment test that precluded them from being included on the "well-qualified" list of applicants—not intentional compensation discrimination—the Petitioners cannot claim the

benefit of the Fair Pay Act's expanded limitations periods in any event.

Since Congress in the Fair Pay Act created a special rule applicable only to intentional compensation discrimination plaintiffs, *Ledbetter*'s immediate accrual rule necessarily applies to all non-compensation based discrimination claims, including that being advanced by the Petitioners in this case. *Accord Gross v. FBL Fin. Svcs., Inc.*, ____U.S. ____, 129 S. Ct. 2343 (2009). As the Seventh Circuit pointed out, the Petitioners "were injured, and their claim accrued, when they were placed in the "qualified" category of the hiring list on the basis of their score in the firefighters' test; for that categorization delayed indefinitely their being hired." Pet. App. 9a. Because the Petitioners failed to file an EEOC charge within 300 days of that injury, the Seventh Circuit correctly reversed the district court decision below and remanded for entry of judgment for the Respondent.

II. THE DECISION BELOW COMPORTS WITH WELL ESTABLISHED TITLE VII PRINCIPLES THAT HAVE BEEN REAFFIRMED TIME AND AGAIN BY THIS COURT

A. From *United Air Lines v. Evans* To *Ledbetter v. Goodyear*, This Court Consistently Has Held That The Lingering Consequences Of Past Acts Have No Legal Effect Under Title VII

Once again, this Court has been called upon "to apply established precedent in a slightly different context." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007), *superseded by statute*,

Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009). From its 1977 decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), to its ruling more recently in *Ledbetter*, this Court consistently has held that the lingering consequences of past acts, even past discriminatory acts, have no present legal effect and thus are not actionable under Title VII. *See also Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989), *abrogated by*, 42 U.S.C. § 2000e-5(e)(2); *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Ledbetter*, 550 U.S. 618.

The plaintiff in *Evans* worked as a flight attendant from 1966 to 1968. When she married in 1968, she was required to resign her employment pursuant to a company policy in place at the time that barred married women from working as flight attendants. In 1972, United rehired Evans as a new employee. She was not given any seniority credit for her prior service, and "for seniority purposes, she [was] treated as though she had no prior service with United." 431 U.S. at 555 (footnote omitted).

Evans claimed that United was guilty of a present violation of Title VII because it did not give her credit after her rehire for service prior to her forced resignation in 1968. The Court explained that assuming her 1968 separation violated Title VII, "the question now presented is whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972 [when she was rehired]." *Id.* at 554. As the district court there noted, Evans was "'seeking to have this court merely reinstate her November, 1966

seniority date which was lost solely by reason of her February, 1968 resignation.'" *Id.* at 556 n.8.

This Court held that Evans had failed to file a timely charge of discrimination. 431 U.S. at 558. An alleged discriminatory act that has not been made the subject of a timely charge, the Court held, "is the legal equivalent of a discriminatory act which occurred before the statute was passed." *Id.* Thus, the act was "merely an unfortunate event in history which has no present legal consequences." *Id.* (emphasis added).

Subsequent decisions of this Court have followed this principle. In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court declined to allow an employee to challenge his denial of tenure (and eventual termination) at the time his employment was to be terminated—after the limitations period for filing a charge had expired—even though he did not feel the effects of the decision until his termination. Applying *Evans*, this Court explained that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* at 257 (citation omitted). It found that "'[the] proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful.'" *Id.* at 258 (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir.1979)) (emphasis added in *Ricks*).

Similarly, in *Lorance v. AT&T Technologies, Inc.*, this Court concluded that "[l]ike Evans, petitioners in the present case have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation." 490 U.S. 900,

908 (1989), *abrogated by*, 42 U.S.C. § 2000e-5(e)(2). Relying again on *Evans* and *Ricks*, the Court restated this principle in *National Railroad Passenger Corp. v. Morgan*, concluding that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." 536 U.S. 101, 113 (2002).

This Court recently reaffirmed *Evans*, *Ricks*, *Lorance*, and *Morgan* in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). There, the Petitioner, Lilly Ledbetter, sought to challenge pay decisions made throughout her nearly twenty-year career on the theory that the sum total led to her being paid substantially less than her male colleagues. Concluding that Ledbetter failed to timely file a Title VII discrimination charge with the EEOC, thus depriving the federal courts of jurisdiction over the matter, the Court pointed out:

> The instruction provided in *Evans*, *Ricks*, *Lorance*, and *Morgan* is clear. The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.

550 U.S. at 628. It thus expressly rejected "the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some

effect to an intentional discriminatory act that occurred outside the charging period." *Id.* at 632.

B. The Use Of An Employment Test That Later Is Challenged As Having Unlawful Adverse Impact Is Not A Continuing Act Subject To *Morgan*'s Expanded Title VII Charge Filing Periods

This Court has said, "[i]n addressing the issue whether an EEOC charge was filed on time, we have stressed the need to identify with care the specific employment practice that is at issue." *Ledbetter* at 624 (citing Morgan); *see also Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 904 (1989) (assessing the timeliness of a Title VII charge "requires us to identify precisely the unlawful employment practice of which petitioners complain"), *abrogated by*, 42 U.S.C. § 2000e-5(e)(2). Once that is done, the reviewing court then must decide when the challenged employment practice "occurred." *See Ledbetter* at 621 ("the time for filing a charge of employment discrimination with the [EEOC] begins when the discriminatory act occurs"). "We have explained that this rule applies to any discrete act of discrimination, including discrimination in termination, failure to promote, denial of transfer, [and] refusal to hire." *Id.* (citation and internal quotation omitted).

In the case of a discrete act, the unlawful employment practice "occurred on the day that it happened." *Morgan*, 536 U.S. at 110. A continuing violation, such as workplace harassment, however, "typically comprises a succession of harassing acts, each of which may not be actionable on its own," *Ledbetter* at 638 (quoting *Morgan*), and thus "cannot be said to occur on any particular day." *Id.* As long as one act "contributing to the claim occurs within the filing

period, the entire time period of the hostile environment may be considered by a court." *Morgan*, 536 U.S. at 117.

In this case, a test having adverse impact—the results of which were used to rank-order applicants and place them in either the "well qualified," "qualified," or "not qualified" categories on the hiring eligibility list—is the unlawful employment practice at issue, which is an incontrovertibly discrete act that "occurred" on January 26, 1996, the date on which the results were announced and the Petitioners were informed of the statistical adverse impact on African-Americans. Pet. App. 2a. While the Petitioners assert that Respondent's use of the test results was a continuing violation subject to *Morgan*'s expanded limitations periods for such claims, the Seventh Circuit below, relying on this Court's *Evans- Ricks-Lorance- Ledbetter* line of reasoning, soundly rejected that contention.[3] Pet. App. 1a-11a.

Writing for the unanimous panel, Circuit Judge Posner correctly concluded that the Petitioners "were injured, and their claim accrued, when they were placed in the 'qualified' category of the hiring list on the basis of their score in the firefighters' test; for that categorization delayed indefinitely their being hired." Pet. App. 9a. He reasoned that "[e]xtension of the 'continuing violation' doctrine in the manner

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[3] Petitioners' argument, if adopted, also ostensibly would allow even those who were placed on the "not qualified" list—who may believe that the test had an unlawful adverse impact—to sit on their hands until the very last selection was made, even though they were told, in no uncertain terms, that they would not be selected. Such an approach would undermine, Title VII's policy aim of uncovering and resolving discrimination in a speedy manner. *See* III, *supra*.

urged by the plaintiffs would have ludicrous consequences." *Id.* He queried:

> Could [Petitioners] ten years later ask to be hired as firefighters and when turned down sue the City for violating Title VII because the reason for not hiring them was that [they] were not in the 'well qualfied' part of the hiring list? The answer implied by the plaintiffs' argument is 'yes.'

Id.

The Seventh Circuit is not alone in concluding, logically, that alleged discrimination stemming from application of an employment test having adverse impact is a discrete act subject to Title VII's 180/300 day charge filing period. In *Cox v. City of Memphis*, for instance, the Sixth Circuit found that the "promotion or hiring from an allegedly tainted promotions roster is not a 'continuing act' but merely the effect of previous discrimination." 230 F.3d 199, 204 (6th Cir. 2000). It reasoned:

> It is at the point of promulgation of the roster that a potential plaintiff is aware that alleged discrimination is likely to play a pivotal role in her future advancement. Hence, the promulgation of an allegedly tainted roster is an event that 'should . . . alert the average lay person to protect his rights.'

Id. (citation omitted). As the Sixth Circuit did in *Cox*, the Seventh Circuit below concluded that the unlawful employment practice at issue was a discrete act, and that the Petitioners were required under Title VII to file an EEOC charge within 300 days of the date they were injured by the practice—in this case, January 26, 1996.

The Petitioners ultimately did not do so, however, and instead waited some 400 days to file a charge challenging the Respondent's use of the test results and eligibility list on disparate impact grounds. In fact, not only did they fail to file an EEOC charge within 300 days of January 26, 1996, but they also failed to file a charge within 300 days of the Respondent's first selection of a "well qualified" candidate from the eligibility list, evidently because their attorney "didn't think it necessary."[4] Pet. App. 11a.

Because Petitioner's claim does not constitute a continuing violation, their failure to file an EEOC charge within 300 days of injury renders their lawsuit untimely.

III. EXPANDING THE STATUTORY TIMEFRAME WITHIN WHICH TITLE VII DISPARATE IMPACT CHARGES MUST BE FILED WOULD UNDERMINE IMPORTANT TITLE VII PRINCIPLES, IMPOSE SUBSTANTIAL BURDENS ON EMPLOYERS, AND CREATE UNNCESSESARY INCONSISTENCY IN HOW THE STATUTE IS ENFORCED

As this Court has observed, a principal objective of Title VII is to promote prompt and efficient resolution of discrimination claims. Congress deliberately

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[4] The Petitioners also seem to claim that the eventual selection of a "well qualified" candidate (and consequentially the non-selection of one or more of them) was itself a discriminatory employment practice, whether or not considered as part of a continuing course of conduct. Yet, they do not and cannot claim that the selection was based on race, or otherwise had a discriminatory adverse impact on African-Americans, and therefore they cannot establish a prima facie case of discrimination under either a disparate impact or a disparate treatment theory.

restricted the rights of individuals to raise Title VII claims when it set the relatively short period within which charges must be filed. As this Court has cautioned:

> By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination . . . [I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days—rather than months or years—we may not simply interject an additional . . . period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

Mohasco Corp. v. Silver, 447 U.S. 807, 825-26 (1980) (footnote omitted); *see also International Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976) ("Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight'") (citation and footnote omitted).[5]

The Court in *Mohasco* also recognized that in choosing Title VII's charge filing limitations period,

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[5] 1972 amendments to Title VII enlarged the limitations period to 180 days. 42 U.S.C. § 2000e-5(e).

Congress intentionally risked leaving some victims of discrimination without a remedy in order to avoid litigation of stale claims, reasoning that the choice "must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." 447 U.S. at 820. Thus, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 826.

Employers must be permitted to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. The purpose of statutes of limitations is to avoid precisely the prejudice to employers that results from defending stale claims. Indeed, they "serve a policy of repose," *Ledbetter*, 550 U.S. at 630, "designed to assure fairness to defendants" and to "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (citation omitted).

The interest of an individual who fails to undertake the "minimal" step of filing a charge to preserve his Title VII claim must, therefore, give way to the interest of avoiding stale claims. *See Ricks*, 449 U.S. at 256-57 ("[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers

from the burden of defending claims arising from employment decisions that are long past") (citations omitted); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones"). This is especially true in the context of employment tests, the results of which may be used "for several years after they are promulgated." *Cox*, 230 F.3d at 205. Therefore, "[t]o allow employees to challenge an eligibility roster during the entire time it is used would be to create substantial uncertainty for employers who have to make important staffing decisions based upon the list." *Id.*

While Petitioners suggest that statistical evidence in disparate impact cases is less likely to become stale over time, thus justifying expanded limitations periods, they fail to account for the importance of non-statistical evidence that often plays a critical role in such cases. While raw statistical data may always be available in disparate impact cases, the individuals called upon to perform the analyses or interpret their results may not be available over time. Or even if available, individuals involved in the process may be less likely as time passes to recall specific conclusions and determinations that informed decisions as to how to use the data. Fading memories of individuals involved in employment practices alleged to have adverse impact is even more a concern post-*Ricci*, in which this Court categorically declared that "statistical disparity alone" is insufficient to establish a prima facie case of unlawful discrimination under Title VII. *Ricci*, 129 S. Ct. at 2702.

In addition to triggering the EEOC's investigation process, a charge also serves the important purpose of providing employers with "fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation from the EEOC." *Shell Oil*, 466 U.S. at 74. This early notice provides the employer's first warning of a potential workplace problem, and often serves as the impetus for conducting an internal investigation into the matter. Where at the conclusion of such an investigation potential violations are uncovered, responsible employers make every effort to correct the problem and take steps to ensure it does not recur. Such efforts serve to advance Congress's desire that voluntary compliance be the "preferred means of achieving the objectives of Title VII." *See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975)).

An employer's earnest attempt to voluntarily comply with Title VII is severely hampered whenever an employee waits months or, as in this case, years, to challenge an existing employment practice as being unlawfully discriminatory. This Court's observation in *Ricks* to that point equally applies here. It said, "[W]e recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes. But, for the reasons we have stated, there can be no claim here that Ricks was not abundantly forewarned." 449 U.S. at 262 n.16 (citations omitted).

In this case, the results of the discriminatory disparate impact were felt when the Petitioners were informed that they did not score well enough to receive further consideration. They were left with no reasonable expectation of being hired. Thus, the eventual selection of a "well qualified" candidate—who was informed on day one that he or she was among those who would be hired—did not injure Petitioners any more than did their classification, on day one, as merely "qualified" for the job.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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IN THE

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ARTHUR L. LEWIS, JR., et al.,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF OFFICIAL HUMAN RIGHTS AGENCIES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*[1]

The International Association of Official Human Rights Agencies (IAOHRA) is a private non-profit corporation headquartered in Washington, D.C, which seeks to promote equal opportunity and equal treatment, to provide assistance in the elimination of unlawful discrimination, and to educate the public and private sectors on human and civil rights issues. The IAOHRA's membership includes state and local Fair Employment Practices Agencies (FEPAs), which are responsible for enforcing anti-discrimination statutes in their respective jurisdictions. A list of our FEPA members is included as Appendix A to this brief.

In addressing Title VII claims, FEPAs work in conjunction with the Equal Employment Opportunity Commission (EEOC) field offices. For the benefit of these member agencies, the IAOHRA conducts civil rights compliance seminars, provides comprehensive training for civil rights enforcement, and serves as a clearinghouse for the exchange of civil rights information.

Amicus curiae is uniquely situated to discuss this case because of its intimate familiarity with the enforcement of Title VII and similar anti-

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[1] Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondent have filed a letter of consent with the Clerk of the Court.

discrimination statutes. It has a strong interest in the fair and efficient enforcement of Title VII.

SUMMARY OF ARGUMENT

The proper accrual date for discriminatory hiring claims is a question of great practical importance to both victims of discrimination and the agencies charged with processing and investigating Title VII charges. The International Association of Official Human Rights Agencies (IAOHRA) represents Fair Employment Practices Agencies (FEPAs) from across the nation (a list of whom is attached as an appendix to this brief). Our members share administrative responsibilities with the Equal Employment Opportunities Commission (EEOC) under Title VII and are required, as a result, to determine the timeliness of tens of thousands of charges of discrimination filed by workers every year. In light of our extensive experience, we believe that the accrual rule adopted by the court of appeals below will result in the unnecessary forfeiture of many meritorious claims of discrimination, in conflict with the basic purposes of Title VII, and will be unduly burdensome for our members to administer.

I. To serve their important purposes, statutes of limitations rules should be clear. This is particularly true under Title VII, where Congress anticipated that workers often would act without the assistance of counsel. In this case, the Court should adopt a straightforward rule for failure-to-hire claims: a claim that an employer has unlawfully refused to hire an applicant accrues when the employer makes its hiring decision.

This rule is easy to understand and simple to administer. It identifies the moment at which the core right protected by Title VII is infringed upon and the worker is on notice that she must act to preserve any claim that the decision was illegal. In this case, petitioners' failure-to-hire claim arose each time the City completed a round of hiring without offering petitioners a job because they were not classified as "well qualified" under the City's flawed classification regime.

The City's proposed rule, by contrast, would predictably lead to the under-enforcement of Title VII in some cases and the premature filing of claims in others. Under the court of appeals' rule, a lay applicant is expected to know that a Title VII violation has occurred – and that he is entitled to file a claim for relief – even before he has been denied the job he has applied for. This is especially troubling in the disparate impact context, where the overall impact of a hiring practice is often unclear until the hiring process is complete.

Our proposed rule would neither permit stale claims to proceed nor deny reasonable repose to employers. In most cases, there is little risk that allowing plaintiffs to await the results of a potentially discriminatory hiring process would routinely permit them to wait years before filing Title VII claims. And even in less common cases such as this, in which an employer relies on a discriminatory practice over the course of several rounds of hiring, the risk of stale evidence is limited because disparate impact claims do not rely on evidence regarding individuals' state of mind, a kind of evidence this

Court has recognized is uniquely susceptible to dissipation.

II. Our rule also is consistent with basic principles governing statutes of limitations in a variety of analogous contexts. A limitations period does not begin until a cause of action accrues, and a cause of action typically does not accrue until a plaintiff has suffered a concrete injury, here the denial of a job. The court of appeals suggested that the mere classification of workers constituted a sufficiently concrete injury to give rise to a Title VII claims. But even assuming petitioners could have brought a claim for illegal *classification* earlier, they suffered a new and distinct harm when the City acted on the basis of that classification to deny them employment. Under general statute of limitations principles, the fact that a present violation is related to a prior one does not prevent a new cause of action from accruing.

Nor does it matter that petitioners brought their claims after the second round of hiring, rather than the first. This Court has long recognized that repeated violations give rise to recurring causes of action, each with its own limitations period. As a result, each time the City refused to hire petitioners because they were not classified as "well qualified" constituted a new use of an unlawful employment practice and gave rise to a new failure-to-hire claim.

This Court's decisions in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), do not hold otherwise. None held, or suggested, that a failure-to-hire claim can accrue in the midst of the hiring

process. Moreover, those cases, unlike this one, involved claims for disparate treatment. In the context of disparate treatment, a new claim arises only with a new act of intentional discrimination; merely acting in reliance upon a prior intentionally discriminatory decision does not give rise to a new disparate treatment claim. The same, however, is not true of disparate impact claims. Every hiring decision in reliance upon the City's classification scheme had a disparate impact on protected workers. And that unjustified impact, in itself, was sufficient to establish a disparate impact violation of Title VII, regardless of intent. Moreover, the special concerns about dissipation of evidence of discriminatory intent do not arise in disparate impact cases, which focus on objective factors (primarily statistical evidence and expert testimony). As a result, even if the *creation* of the City's eligibility list had an actionable disparate effect on workers, the *use* of the test to make hiring decisions also had a disparate impact and resulted in the core injury Title VII was intended to prevent – the discriminatory denial of employment.

ARGUMENT

Title VII requires that every charge of discrimination be investigated by the Equal Employment Opportunity Commission (EEOC) or a state or local Fair Employment Practices Agency (FEPA).[2] The International Association of Official Human Rights Agencies (IAOHRA) represents FEPAs from across the country. *See infra*, Appendix A. Those agencies have extensive practical experience with the administration of Title VII's charge-filing limitations period. IAOHRA files this brief in support of petitioners because, in our view, the decision below will unnecessarily undermine the enforcement of Title VII and impose unwarranted burdens on FEPAs that are already struggling to fulfill their duties under that statute. Consistent with the rules governing limitations periods in analogous contexts, the Court should hold instead that a new disparate impact claim arose each time the City declined to hire petitioners in reliance upon a classification scheme that had an unlawful disparate impact on minority applicants.

I. The Court Should Adopt A Clear, Simple, And Easily Administrable Rule For The Accrual Of Failure-To-Hire Claims Under Title VII.

The court of appeals erred in holding that petitioners' failure-to-hire claim accrued before the City failed to hire them. Affirming that decision

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[2] *See* 42 U.S.C. §§ 2000e-5(b), 2000e-8(b); 29 C.F.R. § 1603.103.

would obliterate what ought to be a bright-line accrual rule that can be easily understood by employees, employers, and enforcement agencies alike.

A. Accrual Rules Should Be Clear.

Limitations periods serve important purposes, but at significant cost. While ensuring repose and avoiding stale claims, they also often cut off relief for valid charges of discrimination and prevent remedies for serious injuries. The costs of limitations periods are exacerbated when the rules governing them are unclear, leading unwary plaintiffs to forfeit meritorious claims not from any lack of diligence on their part, or because foreclosing their claims is necessary to protect the legitimate interests of defendants, but rather because the law has failed to provide adequate notice of when the limitations period begins. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 272-75 & n.34 (1985). The need for clarity and simplicity is especially acute in the context of Title VII's time limits for filing administrative charges of discrimination because Congress anticipated that workers often would act without the assistance of counsel. *See, e.g., Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008); *EEOC v. Commercial Office Prods.*, 486 U.S. 107, 124 (1988); *Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972). Moreover, clear rules benefit defendants as well, giving them confidence that employment decisions made outside the limitations period will no longer be subject to challenge. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) (noting that among the "basic policies of all limitations provisions" is the need for "certainty about . . . a defendant's potential liabilities").

In a series of cases, this Court has attempted to define the accrual rule for Title VII's limitations period in a way that distinguishes between recurring violations (which give rise to renewed opportunities to challenge discriminatory conduct) and cases in which a single violation has continuing adverse implications for the worker (which are not separately actionable). *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Lorance v. AT&T Techs., Inc.*, 490 U.S 900 (1989); *Bazemore v. Friday*, 478 U.S 385 (1986); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). In the course of those decisions, the Court has always established clear rules for particular kinds of Title VII claims. For example, in *Ledbetter*, the Court held that the limitations period for discriminatory pay claims begins to run when the pay decision is made, 550 U.S. at 621, an easy enough rule for employees to understand.[3] And in *Ricks*, the Court held that a discriminatory denial of tenure claim accrues when tenure is denied, not on the professor's last day of work. 449 U.S. at 258.

These decisions are consistent with the reasonable presumption that "Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation." *Wilson*,

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[3] Congress subsequently adopted a different rule in The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (Jan. 29, 2009).

471 U.S. at 275. The Court should adopt an equally bright-line rule here.

B. The Court Of Appeals Should Have Applied The Simple Rule That A Failure-To-Hire Claim Accrues Each Time An Employer Fails To Hire An Applicant In Violation Of Title VII.

In particular, this Court should adopt the intuitive rule that a failure-to-hire claim accrues when an employer fails to hire an applicant in violation of Title VII, whether the failure to hire arises out of intentional discrimination or a flaw in the hiring process that has a disparate impact on protected workers. Or, as applied particularly to a disparate impact claim, the claim accrues when an employer uses an employment practice with an unlawful disparate impact to deny an applicant a job. *See* Petr. Br. 20. The court of appeals' contrary rule will sow confusion and lead to the unnecessary forfeiture of meritorious claims.

1. This straightforward rule accords with the reasonable expectation that a failure-to-hire violation occurs when an employer actually fails to hire someone. Thus, in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), this Court identified "refusal to hire" as a quintessential example of a "[d]iscrete act" that is "easy to identify," *id.* at 114, and which gives rise to a claim on the day it "happen[s]," *id.* at 110. The Court has never suggested that plaintiffs are required to dissect the hiring process and bring their claims within 180 or 300 days of the moment at which unlawful considerations were allowed into the hiring process

(say, when the company established its hiring criteria, when it culled resumes, or when an interviewer took race into account during an interview). Instead, the Court has adopted a clear, easily administered rule under which the limitations period begins when the hiring decision is made and announced. *See id.* at 114; *see also Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (unlawful termination claim accrues when an employee is "notified . . . that a final decision ha[s] been made to terminate their appointments").

In this case, although petitioners were told at an early date that they were classified as "qualified," that classification did not render them ineligible for further consideration or otherwise notify them that they would not be hired. Quite to the contrary, the City informed petitioners that they continued to be eligible for consideration and that the actual hiring decisions would be made at a future date. *See* Pet. App. 2a. Thus, there can be no claim in this case that petitioners were notified of a "final decision," *see Chardon*, 454 U.S. at 8, when the City created its eligibility list. Although the City had told petitioners that it was "not likely" that those in the "qualified" category would be hired, Pet. App. 46a, the actual "final decision" did not occur until later, when the City made its hiring selections. To hold that a cause of action accrues as soon as an employer makes a pessimistic prediction about a future employment action would create a wholly unadministrable rule, laying a trap for unwary employees, burdening the EEOC and FEPAs, and inviting endless controversy in the courts.

In most cases, therefore, a failure-to-hire claim accrues when the employer makes a single, final hiring decision. This case is somewhat more complicated because the City went through several rounds of hiring, each time reviewing the same lists of candidates. But that simply means that the City considered, and failed to hire, petitioners on multiple occasions. Petitioners had a right under Title VII to be fairly considered in each round of hiring without the City relying on an employment practice that had an unlawful disparate impact on minority applicants. Consequently, under the proper accrual rule, a new failure-to-hire claim accrued each time the City made a hiring decision on that unlawful basis. *See infra* at 24-26.

2. The rule we propose is easy to understand and accords with ordinary expectations about when a discriminatory failure to hire "happen[s]." *Morgan*, 536 U.S. at 110. By contrast, adopting the court of appeals' rule would lead to confusion and underenforcement of Title VII, particularly in the context of disparate impact claims. Under the court of appeals' rule, a lay applicant is expected to know that he has a cause of action as soon as a test is given and its results announced, even though he may not know whether it will actually have a disparate impact on hiring generally, or will deprive him of a job in particular. In many cases, it is difficult to discern the impact of particular aspects of the hiring process until the hiring decisions are made. For example, if a city required firefighters to live within a certain distance from the firehouse, that practice may or may not have a disparate impact, depending on the racial composition of the neighborhoods and the

identity of the particular applicants for the job. Until the positions are filled, it will be difficult (perhaps even impossible) to tell whether the practice violates Title VII.

In other cases, it may be reasonably clear that a particular component of the hiring process has a disparate impact while it remains unclear whether the component will be sufficiently important to the ultimate hiring decision to have an actual impact on who is hired. For example, an employer may use an invalid test as part of its hiring process, but simply take the scores into account as one factor among many. Until the hiring decisions are made, it may be impossible to determine whether the use of the test has an actual disparate impact on employment opportunities.

And in some cases, even if it is clear that a practice will have a disparate impact in general, it will be unclear whether the impact will be felt by the particular plaintiff – that is, whether the effect will deprive any particular applicant of a job – until the hiring process is completed. In this case, for example, even if petitioners could have immediately discerned that the City's classification has a disparate impact on minority applicants *in general*, and that the City had no business justification for its practice, there was no way for petitioners to know for certain that the City's hiring practice would deprive *them* of a job. While the City had said that it was "not likely" that it would hire anyone in the "qualified" category, that was simply a prediction, not a decision, and one that turned out to be inaccurate in future years. *See* Pet. App. 16a.

Based on our experience, we believe that it is unrealistic to assume that lay (and often unsophisticated) workers will be able to understand and follow the fine lines drawn by the court of appeals. As a result, many meritorious claims will be lost simply because the rule is complex and unclear, even though workers would have gladly filed earlier if they had simply been able to understand what the law required of them.

C. Adopting The Court Of Appeals' Rule Would Impose Unwarranted Burdens On The Administrative Agencies That Process Title VII Charges.

The lack of clarity in the City's accrual rule would not only unnecessarily extinguish meritorious claims, but also would impose unwarranted burdens on the administrative agencies that must process Title VII charges.

First, the EEOC and FEPAs will have no easier time determining when a claim accrues under the court of appeals' rule than will workers. In processing charges of discrimination, both agencies are required to determine whether the charge is timely filed and states a claim. *See* 29 C.F.R. § 1601.18(a). Making the timeliness determinations under the court of appeals' rule will often be difficult, as the agency will be required to determine not simply when a hiring decision was made, but also at what point *during* the hiring process the disparate impact arose. Moreover, if the court of appeals' decision results in workers filing charges even before the hiring process has run its course, it may be difficult for the agencies to determine whether the

challenged practice has an actual disparate impact. *See supra* at 11-12.

Second, adopting the court of appeals' rule could well increase the volume of charges filed, burdening already overtaxed FEPAs and the EEOC. If petitioners' claim is held to have accrued when the City announced its hiring practice, or informed petitioners' of their classification, similarly situated workers in other cases will undoubtedly feel pressured to file early claims of discrimination even before they know whether the suspect hiring process has an actual disparate impact or will deprive them of a job. Based on our experience, however, there is every reason to believe that in many such cases, the charges could be avoided if the workers were allowed to wait for the hiring process to play itself out. In some instances, the workers will be hired, despite their initial fears. In others, experience with the process, or further investigation, may prove that a charge of discrimination would be unlikely to succeed.

Any unnecessary increase in Title VII charges or increase in the complexity of timeliness determinations would be a most unwelcome development for the agencies that must process the claims of discrimination. The EEOC is presently struggling with the largest caseload in its history.[4] In 2008, the Commission received approximately 95,000 charges (nearly 70,000 of which contained

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[4] *See* EEOC, *Charge Statistics: FY 1997 Through FY 2008*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

Title VII claims).[5] Private sector charges were up 15.2 percent from 2007 and 26 percent from 2006.[6] Yet, the staff of the EEOC has decreased from 2,852 in 2000 to 2,192 in 2009.[7] Unsurprisingly, the backlog of cases has increased as a result. Between 2007 and 2008, the number of unresolved claims at the end of the year increased by nearly 20,000, to 73,951.[8] At the same time, the length of time charges remain pending has increased. In 2007, the Commission set a goal of processing 72% of charges within 180 days.[9] But by the end of fiscal year 2009, its actual rate of completion within 180 days was down to less than 40%.[10] The Commission has now lowered its goals and hopes to achieve a rate of 54% by 2012.[11]

State and local FEPAs face similar challenges. In fiscal year 2008, FEPAs received more than 56,000

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[5] *See* EEOC, *Title VII of the Civil Rights Act of 1964 Charges (includes concurrent charges with ADEA, ADA and EPA): FY 1997 – FY 2008, available at* http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm.

[6] *See* EEOC, *Charge Statistics: FY 1997 Through FY 2008, available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[7] *See* EEOC, *EEOC Budget and Staffing History 1980 to Present, available at* http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm.

[8] *See* EEOC, *FY 2008 Performance and Accountability Report* 6 , *available at* http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2008/par2008.pdf

[9] *See* EEOC, *FY 2009 Performance and Accountability Report* 17, *available at* http://www.eeoc.gov/eeoc/plan/upload/2009par.pdf

[10] *Id.*

[11] *Id.*

charges. *See* EEOC, *Trends for Major Charge Processing Activities* (presented at EEOC/FEPA 2009 Annual Training Conference) (excerpts reproduced at Appendix B). Like the EEOC, FEPAs have experienced extensive budget cuts and staff reductions in recent years. For example, this year the Pennsylvania Human Relations Commission lost 32 of its 178 staff positions. Local offices in North Carolina, Illinois, and Florida had their staffs drastically reduced or were closed altogether. As a result, FEPAs are unable to timely process the volume of charges they are already receiving. For example, in fiscal year 2008, FEPAs were able to process only 48,568 charges, while receiving more than 56,000. *See infra* App. B, at 6a. At the end of that year, FEPAs' dockets included more than 52,000 unresolved charges, a 9.3% increase from the prior year. *Infra* App. B, at 6a. Of the charges that were resolved, more than a quarter had been pending for more than 360 days. *Infra* App. B, at 7a. And of the charges still pending, more than a third had been pending for 360 days or more, and a quarter for more than 540 days. *Infra* App. B, at 7a.

Third, although the court of appeals may have thought that establishing an early accrual date would reduce the number of meritless claims, we fear that its rule will have the opposite effect. As noted above, allowing workers adequate time to see the practical results of a suspect employment practice, and to investigate the merits of a potential charge of discrimination, can often avoid ultimately meritless claims from ever being filed. In our view, the decision below risks short-circuiting that process and encouraging workers to file first and investigate

later, a practice that undermines the salutary claims-winnowing process Title VII's statute of limitations is intended to serve.

D. The Burdens Created By The Court Of Appeals' Rule Are Not Justified By Any Need To Avoid Stale Claims Or Encourage Repose.

This Court has sometimes rejected, as inconsistent with Title VII's protection against stale claims, accrual rules that could allow workers to wait for many years before challenging discriminatory conduct. *See, e.g., Ledbetter*, 550 U.S. at 639; *United Air Lines v. Evans* 431 U.S. 553, 560 (1977). We agree with those concerns as a general matter. However, in most cases, there is little risk of lengthy delays under our rule, which would simply allow workers to wait until a hiring process is finished before bringing a charge.

Of course, in this case, the City used the same unlawful practice in multiple rounds of hiring over several years. But it has been our experience that allowing employees to bring a disparate-impact challenge to each use of the test does not raise significant staleness concerns. As this Court has explained, "concerns regarding stale claims weigh more heavily with respect to proof of the intent associated with employment practices." *Ledbetter*, 550 U.S at 631. "In most disparate-treatment cases, much if not all of the evidence of intent is circumstantial." *Id.* As a result, "the critical issue . . . will often be whether . . . a sufficient inference of discriminatory intent can be drawn." *Id.* This means "the passage of time may seriously diminish the

ability of the parties and the factfinder to reconstruct what actually happened." *Id* at 632. By contrast, this concern does not arise when a plaintiff charges disparate-impact discrimination, because proof of disparate impact is wholly objective (usually statistical evidence and expert testimony). *See e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-995 (1988). As a result, whether evidence of disparate impact is established the day a policy is announced or when that policy is used in practice does not substantially affect the type of evidence presented at trial, making disparate-impact claims much less susceptible to staleness.

Nor does an employer have any legitimate interest in repose so long as it continues to engage in a practice prohibited by Title VII. Petitioners are not asking this Court to adopt a "continuing violations" theory under which current violations subject the employer to liability for prior hiring decisions outside the limitations period. There is no question, for example, that petitioners may not seek compensation for the City's failure to hire them in the first round of hiring, as that decision was made outside the limitations period for their current claims. Instead, petitioners simply argue that each new hiring decision constitutes an independently actionable event for which employers are entitled to repose 300 days after the event takes place, but not sooner. That claim is consistent not only with the underlying purposes of Title VII's limitations period but also, as discussed next, with general statute of limitations principles as applied in other contexts.

II. Well-Established Principles Governing Statutes Of Limitations Confirm That Petitioners' Claims Were Timely Filed.

Congress enacted Title VII's limitations period against the backdrop of an established body of statute of limitations principles, which it presumably understood and intended to follow. *Cf. Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 551 n.5 (2002) (noting that general equitable tolling principles form a "background rule that informs our construction of federal statutes of limitations"). The court of appeals' rule is fundamentally inconsistent with those settled principles.

A. Limitations Periods Begin To Run When The Last Element Of The Plaintiff's Claim – Ordinarily, An Injury Caused By The Illegal Conduct – Is Established.

1. This Court has long recognized "the standard rule that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (citing *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)); *see also Reiter v. Cooper*, 507 U.S. 258, 267 (1993) (declining to countenance the "odd result" that a cause of action and statute of limitations arise at different times "absen[t] . . . any such indication in the statute").

A cause of action ordinarily is not complete until the plaintiff has suffered an injury from the illegal action. That is, "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff[] . . . ." *Zenith Radio Corp.*

v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971); *see also* 51 AM. JUR. 2D LIMITATIONS ON ACTIONS § 148 ("The test to determine when a cause of action arises or accrues is when the plaintiff has suffered a legal injury . . . .").

As relevant here, the elements of petitioners' disparate-impact claim were:

(i) The employer "use[d] a particular employment practice";

(ii) The practice had a "disparate impact" among applicants "on the basis of race"; and

(iii) The practice injured the applicants by "depriv[ing]" them "of employment opportunities."

42 U.S.C. §§ 2000e-2(a)(2), 2000e-2(k)(1)(A)(i).[12] All of these were established when the City made its hiring decision: at that point the City had (1) "used" the challenged employment practice (*i.e.*, the practice of hiring only those classified as "well qualified"), (2) which had a disparate impact on minority applicants, (3) to "deprive" petitioners "of employment opportunities" (namely, a job).

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[12] After the plaintiffs prove their case-in-chief by establishing these elements, the defendant may establish as an affirmative defense that its employment practice had "a manifest relationship to the employment in question, in order to avoid a finding of discrimination." *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982) (internal quotation omitted).

B. Even If A Cause Of Action Was Available Earlier, A New Cause Of Action Can Accrue From A Related Event.

The court of appeals nonetheless held that petitioners could have filed an action earlier, when the test was originally scored and the eligibility list announced, and therefore were barred from bringing an action later, when the list was used to deny them a job. *See* Pet. App. 4a. The hiring decision, the court concluded, was simply an "automatic consequence" of the prior unchallenged classification and, therefore, did not give rise to an independent claim. *Id.* That reasoning is inconsistent with established limitations principles that have been applied for years in analogous contexts.

1. A violation is not insulated from challenge simply because it is related to, or a consequence of, a prior unchallenged unlawful act. For example, the Copyright Act separately prohibits both copying and distributing copyrighted works without the author's permission. 17 U.S.C. § 106(1), (3). But an act of distribution gives rise to a new cause of action with its own limitations period, even if it is made possible only because of a prior unchallenged copying of the work. Thus, for example, in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), the plaintiff discovered that the defendant libraries had copied her copyrighted works. However, she delayed filing suit until after the limitations period had expired on her copying claim. *Id.* at 203. She was nonetheless permitted to maintain an action against the library for unlawfully *distributing* the previously copied work to the public.

Id. Although the time-barred act of copying the work was a necessary step toward the future distribution violations, that fact did not preclude the claim.

Indeed, it is not uncommon that the injury constituting the final element of a cause of action will be the "automatic consequence" of a prior unlawful act that occurred outside the limitations period. In the antitrust context, for example, this Court has held that a new claim with a new limitations period arises every time a customer is charged an unlawful price, even though the price is an automatic consequence of an antecedent price-fixing agreement that occurred outside the limitations period. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (explaining that "each time a plaintiff is injured by an act of the defendant[] a cause of action accrues to him to recover the damages caused by that act . . . and as to those damages, the statute of limitations runs from the commission of the act."); *see also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (same).

Likewise, this Court has recognized that a single unlawful decision can give rise to repeated causes of action under statutes governing certain periodic payments. This Court observed in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192 (1997), that "the standard rule for installment obligations" is that "a new cause of action, carrying its own limitations period, arises from the date each payment is missed." *Id.* at 208 (internal quotation marks omitted). Similarly, an employer's failure to pay minimum wage gives rise to a new claim under the Fair Labor Standards Act with each paycheck. *See, e.g., Knight v. Columbus*, 19

F.3d 579, 581 (11th Cir. 1994) (collecting cases). In both instances, new violations recur even though the unlawful payment could be called an automatic consequence of a prior unlawful decision (*i.e.*, to stop making the installment payments or to set the worker's pay rate below the minimum wage) that occurred only once and outside the limitations period. *Id.*

The same is true under Title VII. For example, if an employer put a worker on a "black list" for having complained of discrimination to the EEOC, a new claim for retaliation would arise every time the employer relied upon that prior designation to punish the worker by filing false disciplinary charges against him, denying him training, or terminating his employment. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002). And this would be true even if it could be said that each of these actions was an "automatic consequence" of the black listing, and even if the black listing was itself independently actionable. So, too, in this case, the City's *reliance* on its eligibility list to deny employment constitutes a new disparate impact violation, even if the prior *creation* of the list was also independently actionable. To the extent classification of employees is sufficiently harmful in itself to violate Title VII, *see* 42 U.S.C. §§ 2000e-2(a)(2), the actual denial of employment constitutes a separate harm – indeed the core injury Title VII is

intended to prevent – that gives rise to its own cause of action.[13]

2. Nor are petitioners' claims untimely because they could have brought a failure-to-hire challenge after the first round of hiring.[14]

Generally, repetition of illegal conduct causing a new injury gives rise to a new cause of action with a new statute of limitations. This is true even if the plaintiff could have, but did not, sue to recover for the earlier injury. *See, e.g.*, 51 AM. JUR. 2D LIMITATIONS ON ACTIONS § 168 ("[I]f a wrongful act is continuous or repeated, the statute of limitations runs from the date of each wrong or from the end of the continuing wrongful conduct."); *id.* at § 23 ("[I]n a case involving two alleged acts of negligence occurring in rapid sequence committed by the same person on the same

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[13] Even if the classification decision was not an independently actionable adverse employment action in itself, there is no question that employees could seek to enjoin use of the eligibility list in order to prevent a *future* violation of Title VII (*i.e.*, to prevent the City from unlawfully refusing to hire them at a later date in reliance on the list). *See, e.g., Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 69-70 (1982). But that prior opportunity to seek prospective relief in no way precludes plaintiffs from seeking a retrospective remedy when the failure-to-hire violation actually occurs.

[14] Neither the court of appeals nor the City appears to take the position that petitioners' claim accrued upon completion of the first hiring round, urging instead that the cause of action arose even earlier, when the eligibility list was announced. But any suggestion that petitioners' claims were rendered untimely through the mere repetition of the unlawful practice through multiple hiring rounds is meritless, for the reasons set forth in this section.

person, where only one of the acts starts the statute of limitations running and a suit based on that act is time-barred, a suit based on the other act is not also time barred.").

Thus, for example, each act of copyright infringement gives rise to a new claim with its own three-year limitations period. So long as an instance of infringement "occurred within three years prior to filing, the action will not be barred even if prior infringements by the same party as to the same work are barred because they occurred more than three years previously." 1-12 NIMMER ON COPYRIGHT § 12.05[B][1][b] (2005) (collecting cases). Accordingly, in *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001), the defendant was liable for sales and rentals of infringing costumes that occurred within the charging period, even though he had started to sell and rent the costumes outside of the charging period.

Likewise, as noted above, this Court has applied the same principle in antitrust and periodic payment contexts, holding that each unlawful transaction constitutes a new violation with its own limitations period. *See supra* at 22-23.

This same principle applies to Title VII claims. This Court has explained that under Title VII, "[t]he existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." *Morgan*, 536 U.S. at 113. Thus, "a freestanding violation may always be charged within its own charging period regardless of

its connection to other violations." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 636 (2007).

There would thus be no question, for example, that an employer would be liable for sex discrimination every time he denied a job to a particular applicant because she was a woman, no matter how many rounds of hiring the woman went through before finally filing suit. And this would be true even if the denial were the result of a general policy, adopted years outside the limitations period, against hiring women. Even though the critical discriminatory decision was made outside the limitations period, and even though the plaintiff may have had multiple prior opportunities to challenge that decision, what Title VII prohibits is the denial of the job because of sex, and each time the employer enforces its policy to deny a woman a job it violates the statute. *Cf. Ledbetter*, 550 U.S. at 628 ("But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed."). This is not, as the court of appeals suggested, Pet. App. 4a-5a, because there is something special about facially discriminatory policies – the result would be the same if the employer had never articulated his bias in a formal policy, or even if the bias were subconscious and unknown even to him. It is because of the basic limitations principle that each episode in a series of recurring violations gives rise to a new opportunity to challenge the unlawful conduct.

3. This Court's decisions in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Ledbetter v.*

Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), are not to the contrary.

In these cases, this Court has held that acting in reliance upon a past discriminatory decision does not constitute a fresh act of intentional discrimination and, therefore, does not give rise to a new limitations period for a disparate treatment claim. The Court has reasoned that although acting on the basis of a past discriminatory decision may have a disparate *effect* on the plaintiff, a present action with a disparate impact does not give rise to a new claim of *intentional* discrimination unless undertaken for a present discriminatory purpose. *See Ledbetter*, 550 U.S. at 628-29; *Ricks*, 449 U.S. at 257-58; *Evans*, 431 U.S. at 558.

This Court did not suggest, much less hold, in any of these cases that a discriminatory failure-to-hire claim can accrue in the midst of the hiring process, or cast doubt on the Court's teaching in *Morgan* that "refusal to hire" constitutes a "[d]iscrete act" which gives rise to a claim on the day it "happen[s]." 536 U.S. at 110. For example, *Ricks* did not suggest that the plaintiff's claim accrued at the point during the tenure process when his national origin was taken into account. Instead, the Court held that his claim accrued "at the time the tenure decision was made and communicated to Ricks." 449 U.S. at 258. By the same token, petitioners' failure-to-hire claim arose when the City reached a hiring decision, not before.

Moreover, the Court has repeatedly made clear that disparate impact claims, like petitioners', do not fall within the rule of *Evans* and *Ricks*. In *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), for

example, this Court applied *Evans* to hold that a seniority system did not give rise to claim of intentional discrimination every time it was applied unless each application was accompanied by a concurrent intent to discriminate. *Id.* at 905-09. But at the same time, the Court explained that the rule would be different for a discriminatory impact claim, whose "statute of limitations [runs] from the time [the] impact is felt." *Id.* at 908.[15]

Likewise, in *Ledbetter*, this Court explained that the rule of *Evans* and *Ricks* applied to Ledbetter's Title VII intentional disparate pay claim, but does not apply to claims under the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1), because unlike the disparate treatment provisions of Title VII, the EPA does not require proof of discriminatory intent.[16] *See* 550 U.S. at 640-41. In *Ledbetter*, the Court held that reliance on a prior intentionally discriminatory pay-setting decision was not itself a fresh act of intentional discrimination. As a result, under *Evans*, no new disparate treatment claim could arise with each paycheck. *Id.* However, the Court did not dispute that relying on that past pay decision has a disparate

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[15] In *Lorance*, no such claim was available because Section 703(h) of Title VII precludes disparate impact challenges to a seniority system. 490 U.S. at 904-05.

[16] The EPA provides that "[n]o employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1).

impact, resulting in the plaintiff's receiving less money each week than her similarly situated male counterparts. And while that effect is not enough to establish a disparate *treatment* claim under Title VII, it *is* enough to establish a violation of the EPA, which has no intent element. *Id.* at 640. And for that reason, the Court saw no conflict between the rule of *Evans* and *Ricks* and the consensus in the lower courts that each disparate pay check constitutes a new violation of the EPA. *See id.*; *cf. also Corning Glassworks v. Brennan*, 417 U.S. 188, 209-210(1974) (finding present-day violation of Equal Pay Act where employer maintained facially neutral pay practices that "perpetuate[d] the effects of the company's prior illegal practice of paying women less than men for equal work").

So, too, in this case. Because discriminatory intent is not an element of a disparate impact claim, the fact that the City made its hiring decision on the basis of its prior classification decision does not render petitioners' disparate impact claims untimely. Each hiring decision constituted a fresh act (hiring exclusively off the "well qualified" list) that satisfied all the elements of a present-day disparate impact claim. And as a result, petitioners' claims were timely and should be reinstated by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 30, 2009

APPENDIX

APPENDIX A

List of Members of the International Association of Official Human Rights Agencies That Are Fair Employment Practices Agencies Responsible For Processing Title VII Charges

Alaska Human Rights Commission

Alexandria Office of Human Rights

Anchorage Equal Rights Commission

Austin Human Rights Commission

Baltimore County Human Relations Commission

Broward County Office of Equal Opportunity

City of Springfield Department of Community Relations

City of Tampa, Department of Community Affairs, Office of Human Rights

Columbus Human Rights Commission

Connecticut Commission on Human Rights and Opportunities

Corpus Christi Human Relations Commission

D.C. Office of Human Rights

Delaware Department of Labor, Office of Anti-Discrimination

East Chicago Human Rights Commission

Evansville & Vanderburgh County Human Relations Commission

Fairfax County Human Rights Commission

Florida Commission on Human Relations

Fort Wayne Metropolitan Human Relations Commission

Fort Worth Community Relations Department

Gary Human Relations Commission

Hillsborough Equal Opportunity & Human Relations Department

Howard County Office of Human Rights

Illinois Department of Human Rights

Indiana Civil Rights Commission

Iowa Civil Rights Commission

Jacksonville Human Rights Commission

Kansas City Human Relations Department

Kansas Human Rights Commission

Kentucky Commission on Human Rights

King County Office of Civil Rights

Lawrence Human Relations Commission

Lincoln Commission on Human Rights

Louisiana Commission on Human Rights

Louisville and Jefferson County Metropolitan Human Relations Commission

Madison Equal Opportunities Division

Maine Human Rights Commission

Maryland Commission on Human Relations

Massachusetts Commission Against Discrimination

Michigan Department of Civil Rights

Minnesota Department of Human Rights

Montana Human Rights Bureau

Montgomery County Human Relations Commission

Nebraska Equal Opportunity Commission

New Jersey Division on Civil Rights

New Mexico Department of Workforce Solutions, Human Rights Division

New York City Commission on Human Rights

New York State Division of Human Rights

North Carolina Office of Administrative Hearings Division of Civil Rights

Ohio Civil Rights Commission

Oklahoma Human Rights Commission

Orlando Human Relations Commission

Palm Beach County Office of Equal Opportunity

Pennsylvania Human Relations Commission

Philadelphia Commission on Human Relations

Pinellas County Office of Human Rights

Pittsburgh Commission on Human Relations

Prince Georges County Human Relations Commission

Prince William County Human Rights Commission

Rhode Island Commission for Human Rights

Seattle Office of Civil Rights

South Bend Human Rights Commission

South Carolina Human Affairs Commission

South Dakota Division Human Rights

St. Louis Civil Rights Enforcement Agency

Tacoma Human Rightsand Human Services

Tennessee Human Rights Commission

Texas Workforce Commission, Commission on Human Rights

Utah Anti-Discrimination Division and Labor Division

Washington State Human Rights Commission

West Virginia Human Rights Commission

Wisconsin Department of Workforce Development, Equal Rights Division

Wyoming Department of Employment, Labor Standards Division

St. Petersburg Human Relations Commission

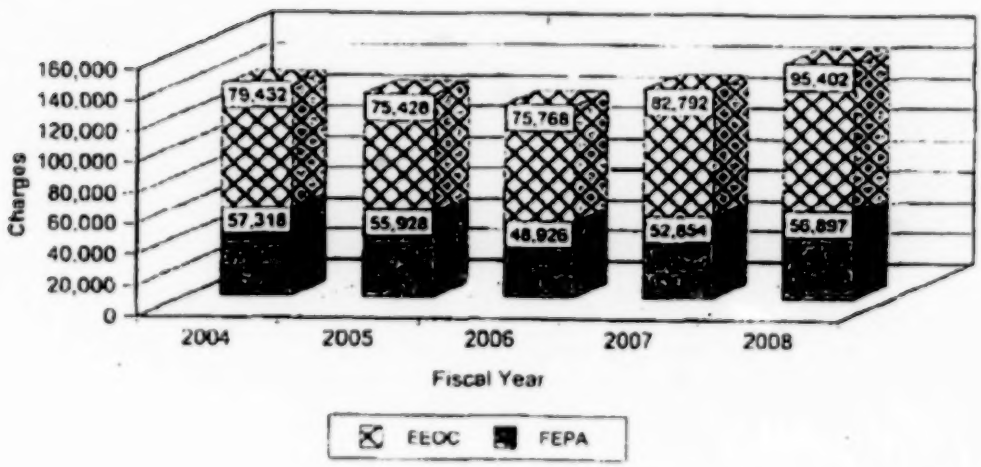
APPENDIX B

Excerpts from

Trends for Major Charge Processing Activities (presented at EEOC/FEPA 2009 Annual Training Conference)

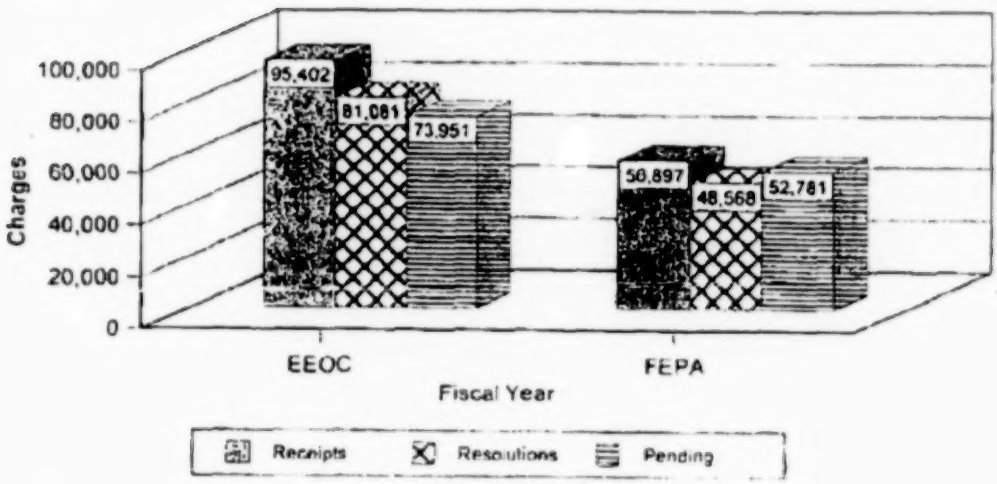
EEOC/FEPA Receipts

FY2004 - FY 2008



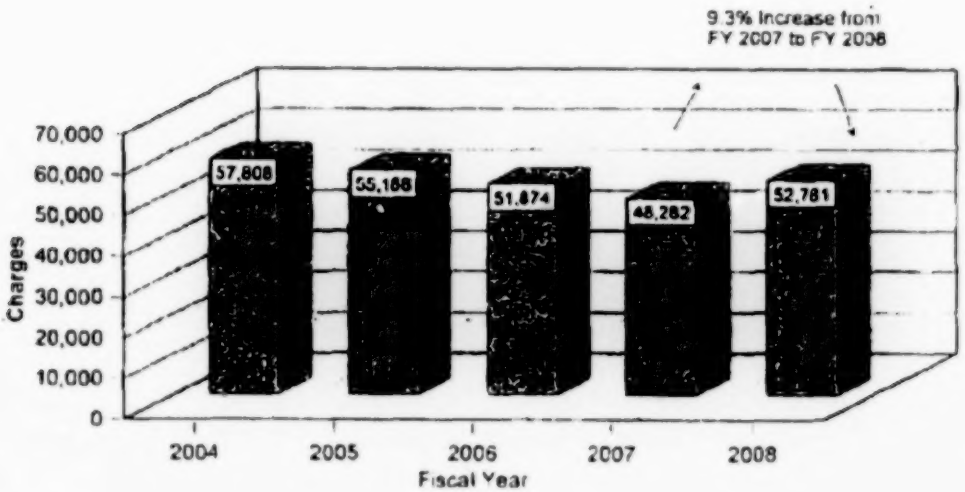
Receipts, Resolutions and Pending

FY 2008



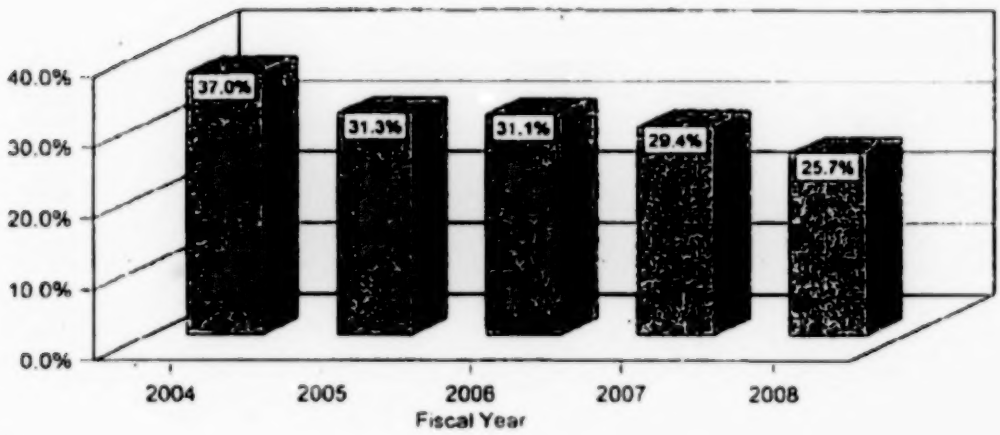
FEPA Pending Inventory

FY 2004 - FY 2008



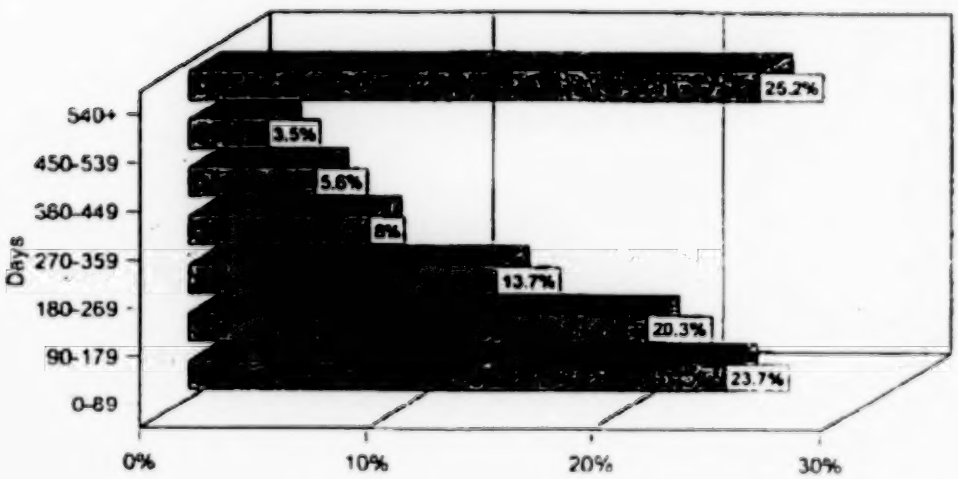
FEPA 360 or More Day Resolutions as Percent of Total Resolutions

FY 2004 - FY 2008



FEPA Age Distribution of Pending Charges

FY 2008



AMICUS CURIAE BRIEF

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Batch 34
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No. 08-974

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IN THE

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ARTHUR L. LEWIS, ET AL., Petitioners,
v.
CITY OF CHICAGO, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES AND THE NATIONAL WOMEN'S LAW CENTER ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Under Title VII, a plaintiff seeking to bring suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice occurred. Where an employer adopts an employment practice that discriminates against African-Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the announcement of the practice, or may a plaintiff file a charge within 300 days after the employer's use of the discriminatory practice?

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INTEREST OF *AMICI CURIAE*

The *National Partnership for Women & Families* (The National Partnership) is a non-profit, non-partisan advocacy group dedicated to promoting fairness in the workplace, access to quality health care and policies that help women and men meet the dual demands of work and family. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeals to advance the opportunities of protected individuals in employment.

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including in fields that are nontraditional for women, and has promoted voluntary compliance by employers with federal and state civil rights laws. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in cases involving Title VII in this Court and in federal circuit courts of appeals.

The National Partnership and the NWLC are joined in filing this brief by 34 other organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans. The individual organizations are described in the attached appendix.

SUMMARY OF ARGUMENT*

Title VII provides that:

> An unlawful employment practice based on disparate impact is established [and thus triggers the limitations period] under this subchapter only if * * * a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity * * *.

42 U.S.C. § 2000e-2(k)(1)(A) (2006). Among the "uses" of such a practice within the statute's plain meaning is an employer's implementation of hiring or promotion practices that cause an unjustified disparate impact.

A Seventh Circuit panel, however, announced a contrary rule that requires plaintiffs to file an EEOC charge within 300 days of the adoption of an eligibility list that sorts candidates based on their test scores. This rule makes no mention of – much less any effort to interpret – the controlling statutory language. It also ignores this Court's precedent making clear that the point at which an unlawful employment practice occurs

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* The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity – other than the *amici curiae*, their members, and their counsel – made a monetary contribution to the preparation or submission of this brief.

depends on the type of claim raised by the plaintiff, and that the defining element of a disparate impact claim occurs when its discriminatory impact is actually "felt."

Furthermore, the Seventh Circuit's rule would lead to a wide range of irrational results. For example, it fails to address the reality that the consequences of an employer's creation of an eligibility list based on rank-order or cut-off scores are often far from clear at the time of its adoption. Although applicants for employment would greatly prefer to be hired or promoted without resorting to costly and time-consuming litigation that may also impair their eventual employment relationships, the Seventh Circuit's rule perversely requires applicants to file a charge immediately upon the creation of such a list or forever lose their right to do so. Protecting employers' interest in repose at all costs – as the Seventh Circuit's rules does – thus irrationally encourages employees to file suit before they can be sure of the practical consequences of an employer's administration of a particular practice.

The irrationality of the Seventh Circuit's rule is further highlighted when one considers selection devices other than tests (or lay-offs or other practices that rely on rank-ordered lists or cut-off scores) that cause a disparate impact. Indeed, employers frequently announce practices that have predictable disparate impacts on protected groups, and then use those practices over a long period of time to take actions that disadvantage members of those groups. In that context, courts uniformly hold or clearly accept that each implementation of the practice with respect to particular individuals is an unlawful employment practice that triggers the limitations period anew,

regardless of its relationship to a prior violation such as the initial decision to adopt such a practice.

Applying the same rule in the testing context best comports with a pragmatic understanding of how and when employers actually use facially neutral practices to make employment decisions. The Seventh Circuit's rule, in contrast, privileges in perpetuity an employer's ability to engage in repetitive uses of employment practices that bear no demonstrable relationship to job performance while causing, as in this case, severe disparate impact.

Indeed, the Seventh Circuit's rule frustrates the statutory purposes underlying the disparate impact provision because it enshrines, rather than ends, those practices that deny job opportunities without any meaningful tether to successful job performance. By immunizing practices that cause unjustified disparate impact from subsequent challenge if plaintiffs fail to object to their initial promulgation within the Title VII limitations period, the Seventh Circuit's rule encourages employers to continue to rely on invalid tests that entrench longstanding patterns of racial and gender hierarchy at the expense of actual merit.

ARGUMENT

I. TITLE VII'S PLAIN LANGUAGE MAKES CLEAR THAT AN UNLAWFUL EMPLOYMENT PRACTICE OCCURS EACH TIME AN EMPLOYER EXECUTES AN EMPLOYMENT PRACTICE THAT CAUSES A DISPARATE IMPACT

Title VII requires that "[a] charge under this section shall be filed * * * within three hundred days

after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1) (2006).[1] Section 703(k)(1)(A) of Title VII then provides:

> *An unlawful employment practice based on disparate impact is established* under this subchapter only if * * * a complaining party demonstrates that a *respondent uses a particular employment practice that causes a disparate impact* on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity * * *.

42 U.S.C. § 2000e-2(k)(1)(A) (2006) (emphasis added).

Among the "uses" of such a practice within the plain meaning of that statutory phrase is an employer's implementation of hiring or promotion practices that cause an unjustified disparate impact. The case currently before this Court illustrates one such use: the City's hiring of some applicants and not others to fill vacancies on eleven different occasions based on the applicants' comparative scores on a test that caused a disparate impact based on race while bearing no demonstrable relationship to job performance. See Pet. App. 16a.

This Court supported such an understanding of the statute's plain language in its only discussion to date of the limitations period for Title VII disparate impact claims. See *Lorance* v. *AT&T Technologies, Inc.*,

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[1] Under certain circumstances not at issue in this case, the limitations period is 180 days. See 42 U.S.C. § 2000e-5(e)(1) (2006).

490 U.S. 900, 904-10 (1989). *Lorance* involved a claim that an employer had engaged in intentional sex discrimination when it altered its rules governing employee seniority in a way that disadvantaged women. *Id.* at 903. While noting that it had previously interpreted Title VII's section 703(h) to preclude disparate impact challenges to seniority plans,[2] the Court commented on the limitations period for those situations in which disparate impact challenges are permitted. *Id.* at 908. There it observed that when "the claim asserted is one of discriminatory impact," the limitations period would "run from the time that impact is felt." *Id.* In this case, for example, the discriminatory impact is felt when the employer offers or declines employment to individuals based on a practice that imposes a disparate impact against African-American applicants.

II. THE SEVENTH CIRCUIT'S CONTRARY RULE IGNORES NOT ONLY TITLE VII'S PLAIN LANGUAGE, BUT ALSO THIS COURT'S PRECEDENT MAKING CLEAR THAT THE POINT AT WHICH AN UNLAWFUL EMPLOYMENT PRACTICE OCCURS DEPENDS ON THE TYPE OF CLAIM, AND THAT THE DEFINING ELEMENT OF A DISPARATE IMPACT CLAIM IS THE PRACTICE'S EFFECT.

In a decision that makes no mention of – much less any effort to interpret – the controlling statutory

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[2] Neither the facts in this case nor in any of the other cases discussed in this brief involve attempts to challenge a seniority plan under a disparate impact theory.

language, the Seventh Circuit announced a contrary rule that requires a plaintiff to file an EEOC charge within 300 days of the adoption of an eligibility list that sorts applicants based on their test scores, regardless of when (or whether) that list is actually used to hire applicants or when its discriminatory impact is actually felt. See Pet. App. 3a-4a. Under this extremely narrow rule, the initial adoption of a practice that causes disparate impact is the *only* event that triggers the limitations period, and all subsequent challenges to the practice's use are time-barred.

In so holding, the Seventh Circuit cited this Court's precedent addressing the limitations period for disparate treatment claims. *Id.* at 490-91. But as this Court observed when calculating Title VII limitations periods in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 (2002), "[t]he critical questions, then, are: What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" As the Court then explained in *Morgan*, "[t]he answer varies with the practice." *Id.* Indeed, Title VII makes unlawful a range of employment practices, with varying requisite elements. Not surprisingly, the point at which all of the elements are present – and thus at which the unlawful employment practice occurs, triggering the start of the limitations period – depends on the type of claim raised by the plaintiff.

In *Morgan*, for example, the Court applied this principle to hold that the limitations period is triggered at different points for a hostile environment claim as opposed to a garden-variety disparate treatment claim. See *id.* at 110-20. In particular, the Court described the cumulative requirement that a hostile environment

be sufficiently severe or pervasive to alter the terms and conditions of employment before it becomes unlawful (an element not present in a garden-variety disparate treatment case), *id.* at 116-17, as critical to its holding that a hostile environment claim is not time barred "so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Id.* at 122.

As yet another example of how the time at which an unlawful employment practice occurs varies with the differing elements required by different types of Title VII claims, consider the religious accommodation context. A plaintiff establishes a prima facie claim under a religious accommodation theory by proving that her bona fide religious belief or practice conflicted with a job duty, that she informed her employer of the conflict, and that the employer threatened or subjected her to discriminatory treatment because of her inability to fulfill the job duty due to the conflict. See, *e.g.*, *Heller* v. *Ebb Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). Under such a claim, the unlawful employment practice occurs – and the limitations period begins – *not* at the time that a facially neutral practice (*e.g.*, a requirement that all employees work on the weekend) is announced, but instead at the time the employer takes adverse employment action against the plaintiff (*e.g.*, the time at which the employer denies the plaintiff's request for a shift swap and threatens to fire her for refusing to work on her Sabbath).

For disparate treatment purposes, as an additional illustration, the statute provides that "[i]t shall be an unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual * * * because of such individual's race,

color, religion, sex, or national origin * * *." 42 U.S.C. § 2000e-2(a) (2006). The requisite elements of an unlawful employment practice under a disparate treatment theory, unlike a disparate impact claim, thus include the respondent's culpable mental state – i.e., its intent to discriminate on the basis of a protected characteristic. For this reason, this Court has held that the limitations period for a disparate treatment claim begins to run when the employment decision is made with the requisite culpable mental state – because that is the point when an employer's actions satisfy, at the time of those actions, all the elements of a violation. Because a disparate treatment claim requires a showing of discriminatory intent, the Court reasoned that later execution of that decision or other adverse decisions that are unaccompanied by the defendant's intent to discriminate on the basis of a protected characteristic do not trigger the disparate treatment limitations period anew. See, *e.g.*, *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624, 629-31 (2007) (concluding that because "the central element" in a disparate treatment claim is discriminatory intent, the limitations period begins to run from the date that such intent accompanies a particular employment decision).[3]

In contrast, an employer's intent to discriminate is not an element of a disparate impact claim under Title VII. Instead, as the Court has repeatedly observed, the defining element of a disparate impact

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[3] Note that the Lilly Ledbetter Fair Pay Act of 2009 now requires that, in discriminatory compensation cases, the statute of limitations begins to run not only when the discriminatory practice is adopted, but also when the employee "becomes subject to" or is "affected by application of" a discriminatory compensation scheme. 42 U.S.C. § 2000e-5(e)(3)(A).

claim is the (non-job-related) practice's effect or consequences in disproportionately excluding protected class members from job opportunities. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422-23 (1975) ("Congress directed the thrust of [Title VII] * * * to the consequences of employment practices, not simply the motivation.") (quoting *Griggs* v. *Duke Power*, 401 U.S. 424, 432 (1971))(internal quotation marks omitted).

Indeed, the statute defines an unlawful employment practice for disparate impact purposes as an employer's "*use*[] [of] a particular employment practice *that causes a disparate impact* on the basis" of a protected characteristic. 42 U.S.C. § 2000e-2(k)(1)(A) (2006) (emphasis added). An employer "uses" such a practice within the plain meaning of that statutory phrase each time it executes an employment practice that causes a disparate impact.

III. THE SEVENTH CIRCUIT'S RULE FRUSTRATES THE PURPOSES UNDERLYING TITLE VII'S DISPARATE IMPACT PROVISION AND LEADS TO IRRATIONAL RESULTS

A. The Seventh Circuit's Rule Would Lead to a Wide Range of Irrational Results

The Seventh Circuit required the plaintiffs to file an EEOC charge within 300 days of the adoption of an eligibility list that sorted candidates based on their test scores, regardless of when those scores were actually used or when their discriminatory impact was actually felt. See Pet. App. 4a, 11a. It characterized the City's later failure (on eleven different occasions) to hire

applicants based on their scores on a test that caused an unjustified disparate impact *not* as an unlawful employment practice that triggered the limitations period anew but instead as simply the "automatic consequence" of the scoring itself. *Id.* at 4a; see also *id.* at 6a ("An applicant who fails to meet the employer's standard is hurt not by a fresh act of discrimination, but as the automatic consequence of an earlier one – the adoption of the standard."). Not only is this "automatic consequences" rule entirely unmoored from the statutory text, but it would also lead to a wide range of irrational results in disparate impact challenges to tests and related employment practices that rely on candidates' rank-order score or score relative to a cut-off standard.

Indeed, the Seventh Circuit's rule fails to address the reality that the consequences of an employer's adoption of an eligibility list based on rank-order or cut-off scores are often far from clear at the time of its creation. In the testing context, for example, employers frequently use various rankings based on test performance to make employment decisions over time – with individuals often unable to predict when, if ever, they might be provided or denied job opportunities based on those rankings. See, *e.g.*, *United States* v. *City of New York*, 637 F. Supp. 2d 77, 91-92 (E.D.N.Y. 2009) (describing circumstances where African-American and Latino candidates with passing scores on a firefighters' exam could not know whether their scores would permit their rank-order hiring until the City decided to stop hiring from the list); *Bradley* v. *City of Lynn*, 443 F. Supp. 2d 145, 151-52 (D. Mass. 2006) (describing circumstances where African-American and Latino candidates with passing scores on civil service examination used by all Massachusetts municipalities

could not know whether or when their scores would permit their rank-order hiring).

Consider the facts of this case. Those applicants who were rated as "Qualified" after taking the test received a notice that included the following:

> Due to the large number of candidates who received higher scores and were rated as "Well Qualified," and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, *because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.*

Pet. App. 46a (emphasis added). Indeed, the City used the list for hiring purposes until 2007, a much longer period than originally anticipated. See *id.* at 16a. For the first ten rounds of hiring over five years, the City pulled only from those in the "well qualified" category. *Id.* Starting in 2001 and continuing until 2007 (when new hiring procedures were adopted), the City hired from those in the "qualified" category. *Id.* So for those in the qualified category, the "consequences" of their ranking was far from automatic.

Candidates for job opportunities would greatly prefer to be hired or promoted without resorting to costly and time-consuming litigation that may also impair their eventual employment relationships. Indeed, such an outcome is vastly preferable for employers as well as employees. Yet the Seventh

Circuit's rule perversely requires applicants to file a charge immediately or forever lose their right to do so.

The facts in *Bouman* v. *Block*, 940 F.2d 1211 (9th Cir. 1991), illustrate this scenario, where the consequences of an employer's adoption of a practice that imposed a disparate impact remained uncertain at the time of its adoption. There the sheriff's department administered and scored a promotional examination in 1975, and created an eligibility list based on the rankings. *Id.* at 1217. At the time of the list's expiration in 1977 (after which it was no longer used to make promotional decisions), "Bouman was at the top of the list and would have received the next appointment," *id.* at 1217, and "not until the list expired was it certain that she would not be promoted." *Id.* at 1221. The Ninth Circuit held that the plaintiff's charge was timely filed within 300 days of the list's expiration – even though the charge was filed more than 300 days after the list's creation. *Id.* Yet the Seventh Circuit's rule would have required Deputy Bouman to have filed her charge immediately upon the list's release, rather than wait and see whether she would be promoted from the list.

Bridgeport Guardians, Inc. v. *City of Bridgeport*, 933 F.2d 1140 (2nd Cir. 1991), provides another example. In August 1989, the city intended to promote only 19 candidates in rank order from an eligibility list based on applicants' performance on a test administered in April 1989, with whites making up the first 19 candidates on the list, the first African-American ranked 20th, and the first Latino ranked 22nd. *Id.* at 1144-45. The city's plans later changed such that it planned to promote at least the first 25 on the list and perhaps considerably more. *Id.* Yet the Seventh Circuit's rule would have required the African-

American and Latino candidates to file a charge within 300 days of the list's initial creation, rather than wait to see whether they would be promoted from the list without litigation.

Other testing scenarios further illustrate the irrational implications of the Seventh Circuit's rule. For example, consider the situation where a city creates a list similar to that in this case (that limits hiring to those on a "well qualified" list that has a clear disparate impact) but also announces at the same time that economic conditions leave it unable to begin hiring from the list for an indefinite period of time. Similarly, consider a city that administers a test, notifies applicants of their scores (and the test's disparate impact), and announces that hiring will be done in rank order but that the number and timing of hires remains uncertain – perhaps due to changing budgetary conditions. Under the Seventh Circuit's rule, potential plaintiffs must file within 300 days of the list's creation or forever lose the ability to challenge what may be a deeply flawed test – even though the test may not be used to make hiring decisions for quite some time, if ever.

Reductions-in-force raise similar concerns, where an employer may create a rank order list from which an indefinite number of lay-offs and other employment decisions may later be made. See, *e.g.*, *EEOC* v. *Schott N. Am., Inc.*, 2008 U.S. Dist. LEXIS 75225, at *8-16 (M.D. Pa. Sept. 29, 2008) (describing circumstances where decisions about future job opportunities were based on an employee's grade on a matrix – which, according to the plaintiff had a disparate impact against women because it heavily weighted the types of tasks done by men). Reductions-in-force are often implemented in a series, with the number of lay-offs

contingent on future economic conditions and/or voluntary attrition. See, *e.g.*, *Gibson* v. *AT&T Info. Sys., Inc.*, 1991 U.S. Dist. LEXIS 19264, at *7-13 (M.D.N.C. Sept. 16, 1991) (describing circumstances where employer created a rank-order list of employees to be selected for lay-off based on supervisors' rankings, but where the number of individuals actually laid off would be reduced by the number of employees who accepted a buy-out or otherwise left voluntarily). Again, at the time of the list's creation, an individual employee may well have no idea whether or when her rank will lead to her later lay-off. Yet the Seventh Circuit's rule would require her to file the charge at the time of the list's creation rather than see how the list is actually used.

Indeed, the Seventh Circuit's rule fails to address the reality that the consequences of an employer's creation of an eligibility or similar list that imposes a disparate impact are frequently quite uncertain. Protecting employers' interest in repose at all costs – as the Seventh Circuit's rules do – thus irrationally encourages employees to file suit before they can be sure of the practical consequences of an employer's administration of a particular practice.

Moreover, the Seventh Circuit's rule is unnecessary to protect employers' legitimate interests in repose. As this Court observed in addressing this concern in the hostile work environment area, see *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 121 (2002), defendants always have equitable defenses, including estoppel, laches, and equitable tolling. In *Morgan*, Justice Thomas responded specifically to employers' fears that they would be left defenseless as to stale claims: "the [EEOC] filing period is not a jurisdictional prerequisite to filing a Title VII

suit. Rather, it is a requirement subject to waiver, estoppel, and equitable tolling 'when equity so requires.'" *Id.* (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982)). Statutory limitations on the remedies available under Title VII, moreover, provide further incentive to file promptly, as backpay is allowed only for the two years immediately prior to the filing of a charge. 42 U.S.C. § 2000e-5(g)(1) (2006). The appropriate rule of law would thus permit an employee to attack an employment selection device that has a disparate impact whenever it is used, subject to the equitable defenses recognized in *Morgan*.[4]

B. The Seventh Circuit's Rule Is Inconsistent With the Rule Uniformly Applied to Disparate Impact Challenges In Non-Testing Contexts, Further Illustrating its Impracticability

The irrationality of the Seventh Circuit's rule is further highlighted when one considers practices that create a disparate impact outside of the context of eligibility or lay-off lists based on rank-order or cut-off scores. Indeed, it is not uncommon for an employer to announce its adoption of a practice that causes a predictable disparate impact on a protected group, and then repeatedly use that practice over a long period of time to take actions that disadvantage members of that

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[4] The *Ledbetter* Court was also concerned about stale claims and that "evidence relating to intent may fade quickly with time." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 631 (2007). However, these concerns do not apply to disparate impact claims. Where a city is actively hiring using certain test results, data and witnesses are readily available, and there is no concern about fading memories. To the extent that an employer continues to use a selection device which has a disparate impact, employers can reasonably be expected to demonstrate the job relatedness of their test.

group. In these cases, courts uniformly hold or clearly accept that each "use" of an unlawful employment practice triggers the limitations period anew, regardless of its relationship to a prior violation such as the initial adoption of such a practice.

To be sure, some plaintiffs in these contexts would not have standing to challenge a practice at the time of its initial adoption (*e.g.*, because they would not yet be adversely affected by application of the policy[5] or because they do not yet work for or seek employment from that particular employer). But courts have not insisted on the Seventh Circuit's cramped understanding of the limitations period even when the practice's adverse impact on the plaintiff and other protected class members is immediately apparent. Instead, courts focus on when the practice's impact is felt by the employee, rather than when it was adopted. Each "use" of an unlawful employment practice triggers the limitations period anew, regardless of its relationship to an earlier violation such as the initial adoption of such a practice.[6]

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[5] Consider, for example, an African-American who lives in a jurisdiction at the time that it announces a residency requirement, only later to apply for employment after moving to the neighboring community. Or an employee who has a strong credit score at the time that his employer announces its new policy that promotions to leadership positions will be contingent on a certain credit score – only to be denied the promotion when he later applies for promotion when his score has worsened due to illness, divorce, or other factors.

[6] The Seventh Circuit appeared to recognize the practicality of this approach in another context. See *Heiar* v. *Crawford County*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). In an ADEA disparate treatment challenge to an employer's mandatory retirement policy, the Seventh Circuit rejected the idea that the limitations period ran from the time that the employee

Consider, for example, residency requirements that impose a significant disparate impact on the basis of race and/or national origin in jurisdictions with small minority populations. The Title VII limitations period runs each time the employer uses such a practice to deny employment to an individual person of color, not simply at the time of the requirement's adoption even though its disparate impact may be immediately apparent. Indeed, the Sixth Circuit specifically so held in *Cleveland Branch, NAACP* v. *City of Parma*, 263

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received notice of the employer's policy when she first started on the job, rather than from the time that the policy was applied to her. *Id.* at 1194. As Judge Posner wrote:

> Admittedly there is a paradox in applying a notice standard to a case challenging a mandatory retirement age. The defendants in such cases could argue that the statute of limitations began to run on the day the employee started work; for, as long as he is told then what the terms of his employment are, that is the day on which he receives "notice" that he will be unlawfully terminated. And maybe, on this view, if the employee learned of those terms before he signed on, the statute of limitations would begin to run *before* he began to work. Such arguments, if accepted, would unduly constrict employees' ability to enforce their rights under the Act. People do not want to begin their employment by suing their employer over a mandatory retirement age that is 30 years in the future for them; and in those few cases that were brought, the courts would be deciding disputes prematurely. And yet the argument is a plausible corollary to the idea that notice sets the statute of limitations running. But no court has pressed the logic of the notice approach so relentlessly, or is likely to do so; and we merely want to emphasize that, merely because a specific notice of termination, such as the plaintiffs in this case received, starts the 180-day statute of limitations running, it does not follow that the notice an employee receives when he is first hired would also set the statute to run; it surely would not.

Id.

F.3d 513, 536 (6th Cir. 2001), where the City argued that the NAACP's challenge was not timely filed because it was not within 300 days of the City's 1988 adoption of the policy. The Court held that "[t]he NAACP was not required to file an EEOC charge within 300 days of the enactment of the 1988 ordinance, as the NAACP argues, in part, that Parma is still according an unfair preference to its residents." *Id.* In other words, the plaintiffs satisfied the limitations period because the City continued to use the residency requirement that caused a disparate impact to execute hiring decisions about individual applicants. See also *Newark Branch, NAACP* v. *Town of Harrison*, 940 F.2d 792, 796 (3rd Cir. 1991) (invalidating, on disparate impact grounds, the residency requirement adopted in 1981 that was used to deny plaintiffs' job applications in 1989).

Height and weight requirements, as another example, almost always cause a significant disparate impact on the basis of gender, excluding women from a wide range of public safety jobs without any demonstrable connection to successful job performance. See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-32 (1977) (striking down Alabama's height and weight requirements for correctional counselors because they disproportionately excluded women without any showing of job-relatedness); *Costa* v. *Markey*, 706 F.2d 1, 6 (1st Cir. 1982) (police department's height requirement imposed unjustified disparate impact on women in violation of Title VII); *United States* v. *Virginia*, 620 F.2d 1018, 1024 (4th Cir. 1980) (Virginia State Patrol's height and weight requirement disproportionately excluded women without basis in business necessity in violation of Title VII); *Horace* v.

City of Pontiac, 624 F.2d 765, 768-69 (6th Cir. 1980) (police department's height requirement imposed unjustified disparate impact in violation of Title VII). Courts have consistently allowed employees to attack these requirements whenever they are used to deny employment to a woman, even if this use is years after the requirement's initial adoption and announcement.

As an illustration, in *Dothard* v. *Rawlinson*, 433 U.S. 321, 323-24 (1977), the Supreme Court heard a challenge to an Alabama statute that required corrections officers to weigh more than 120 pounds and stand at least 5 feet 2 inches. Although the statute was more than 20 years old,[7] the Supreme Court addressed the plaintiff's claims without discussing the timeliness of the claim. The Court noted that the plaintiff "filed a charge with the [EEOC] * * * and ultimately received a right to sue letter. She then filed a complaint in the District Court * * *." *Id.* at 324. Thus, *Dothard* provides a clear example of the Court allowing a plaintiff to challenge a policy that causes disparate impact at the time it is *used*, rather than when the selection device producing the disparate impact was initially adopted.

Other courts that have addressed height and weight standards have been similarly unconcerned with when the standards were initially created. These courts simply permitted the standards to be challenged at the time they were used to deny employment to individual applicants. See, *e.g.*, *LeBoeuf* v. *Ramsey*, 503

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[7] The statute at issue had originally been enacted in 1940. See Brief of Appellants at *3, *Dothard* v. *Mieth*, 1977 WL 189472 (U.S. 1977) (No. 76-422) (citing Ala. Code tit. 55, § 373(109) (1940) (Recomp. 1958)).

F. Supp. 747. 751 (D. Mass. 1980) (allowing a Title VII challenge to a height requirement for police officers that was promulgated in 1972), *rev'd in part sub nom. Costa* v. *Markey*, 677 F.2d 158 (1st Cir. 1982), *rev'd on reh'g*, 706 F.2d 1 (1st Cir. 1982), *reh'g en banc granted and rev'd*, 706 F.2d 1, 10 (1st Cir. 1982) (en banc); *Frank* v. *United Airlines, Inc.*, 216 F.3d 845, 847 (9th Cir. 2000) ("From 1980 to 1994, defendant * * * required flight attendants to comply with maximum weight requirements based on sex, height, and age* * * . In 1992, plaintiffs filed this action * * * to challenge these weight requirements.").[8]

Similarly, employer "no-beard" rules cause a significant disparate impact on African-American men, who suffer disproportionately from a skin condition that makes shaving difficult. See *Bradley* v. *Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 796 (8th Cir. 1993); *EEOC* v. *Greyhound Lines, Inc.*, 635 F.2d 188, 190 (3rd Cir. 1980); *Richardson* v. *Quik Trip Corp.*, 591 F. Supp. 1151, 1154 (S.D. Iowa 1984). Again, when these types of requirements have a disparate impact, courts uniformly treat them as actionable whenever they are used to hire or fire employees.

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[8] In *LeBoeuf*, the New Bedford City Police Department originally instituted height requirements for police officers in 1972, and again on July 24, 1973. *LeBoeuf* v. *Ramsey*, 503 F. Supp. 747, 750-751 (D. Mass. 1980). The plaintiff was denied employment because of the height requirement in August 1974. *Id.* at 752. She filed her complaints with the state on September 9, 1974, and with the EEOC on Sept. 16, 1974. *Id.* at 753. Similarly, in *Gerdom* v. *Continental Airlines, Inc.*, 692 F.2d 602, 603-04 (9th Cir. 1982), Continental Airlines had a height and weight requirement for flight attendants from the early 1960s until 1973. The case was not filed in district court until 1972. *Id.*

Consider too the example of employers that provide no (or unsanitary) bathroom facilities despite that decision's disparate impact against women. See *Lynch* v. *Freeman*, 817 F.2d 380, 388 (6th Cir. 1987); *Johnson* v. *AK Steel Corp.*, 2008 U.S. Dist. LEXIS 41573, at *16-17 (S.D. Ohio May 23, 2008); *James* v. *National R.R. Passenger Corp.*, 2005 U.S. Dist. LEXIS 5401, at *12-14 (S.D.N.Y. Mar. 30, 2005). This too involves a practice that is used on an ongoing basis to cause disparate impact against women and thus is treated as subject to challenge until the practice is abandoned.

For the same reasons, experience requirements that impose a disparate impact trigger the limitations period when they are used to deny employment or promotion to applicants or employees, and not just at the time of their adoption. See *Stagi* v. *National R.R. Passenger Corp.*, 407 F. Supp. 2d 671, 673 (E.D. Pa. 2005) (describing circumstances where employer adopted a policy that made promotion contingent on at least one year's tenure in current union position that was not challenged until it was used several years later to deny promotions disproportionately to women).

Similarly, employer policies that deny employment based on arrest or conviction records often impose a significant disparate impact on the basis of race. See, *e.g.*, *Green* v. *Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975) (employer's policy of refusing to hire any person convicted of a crime other than a minor traffic offense violates Title VII because the practice had a disparate impact on African-American candidates and was not job-related); *Gregory* v. *Litton Sys., Inc.*, 472 F.2d 631, 632 (9th Cir. 1972) (questionnaire asking potential employees for their arrest records had a disparate impact on African-

American employees, and employer failed to demonstrate need for its policy). Again, the limitations period is triggered each time that an employer actually hires or fires employees on the basis of information contained in arrest or conviction records in a manner that results in a disparate impact.

Outside of the testing context, courts thus routinely understand the Title VII limitations period as running anew each time a practice that causes a disparate impact is used to execute employment decisions about employees. Applying the same rule in the testing context best comports with a pragmatic understanding of how and when employers actually use facially neutral practices to implement employment decisions. The Seventh Circuit's rule, in contrast, privileges in perpetuity an employer's ability to engage in repetitive uses of employment practices that cause an unjustified disparate impact.

C. The Seventh Circuit's Rule Frustrates the Important Purposes to be Served by Title VII's Disparate Impact Standard by Permitting Employers to Enshrine, Rather than End, Those Practices that Deny Job Opportunities on the Basis of Race, Gender, and National Origin Without any Meaningful Tether to Successful Job Performance.

Non-job-related employment practices that disproportionately exclude protected class members from job opportunities frustrate Title VII's antidiscrimination objectives in at least two ways. First, employment practices that disproportionately disadvantage women and people of color without any meaningful relationship to successful job performance

may institutionalize longstanding patterns of discrimination. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 426-30 (1971) (observing that employer's non-job-related tests disproportionately excluded African-Americans from jobs that "formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites" and thus operated "to 'freeze' the status quo of prior discriminatory employment practices").

Second, employment practices that impose a disparate impact often reflect unexamined and inaccurate assumptions and stereotypes about the skills and capabilities that predict successful job performance. See *id.* at 431-32 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification * * *. [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

For these reasons, this Court has long held that Title VII prohibits unjustified disparate impact as a critically important component of the Civil Rights Act's commitment to equal opportunity in the workplace. See *id.* at 431-32 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation * * *. Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.") (emphasis in original); see also *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasizing that Title VII "prohibit[s] all practices in whatever form which create

inequality in employment opportunity due to discrimination") (citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971)).

Congress confirmed its intent to target disparate impact discrimination as an unlawful barrier to equal employment opportunity when it codified the disparate impact standard in the Civil Rights Act of 1991. See Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (codified as amended at 42 U.S.C. § 2000e-2(k) (2006)). Congress there made clear its determination to restore a robust understanding of the disparate impact standard and its requirement of job-relatedness for practices that disproportionately exclude members of protected groups. Finding that "the decision of the Supreme Court in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections," Congress specifically identified the Act's purposes to include "codify[ing] the concepts of `business necessity' and `job related' enunciated by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989)." §§ 2(2), 3(2), 105 Stat. at 1071.

By requiring careful examination of employment practices that impose a disparate impact on protected class members, Title VII thus enhances not only equal access to job opportunities, but also a commitment to true merit selection. As this Court has observed, "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and

mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." *Griggs*, 401 U.S. at 436.

Title VII's disparate impact provision has played a powerful role in expanding opportunities for women and people of color on the job. As just one example, disparate impact challenges are greatly responsible for women's entry into the paid firefighting corps. No woman had ever served as a paid firefighter in the United States before Congress extended Title VII's reach to include state and local government employers in 1972. Denise M. Hulett, Marc Bendick, Jr., Sheila Y. Thomas, & Francine Moccio, *Enhancing Women's Inclusion in Firefighting in the USA*, 8 INT'L J. OF DIVERSITY IN ORGANIZATIONS, COMMUNITIES, AND NATIONS 189, 191 (2008). Nor did public safety agencies hire women as firefighters in any significant numbers until the 1980s. *Id.*

But attention to disparate impact thereafter led to the elimination of agencies' height and weight requirements, certain physical ability tests, and other selection practices that disproportionately excluded women from a wide range of public safety jobs without any demonstrable connection to successful job performance. See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-32 (1977) (striking down Alabama's height and weight requirements for correctional counselors because they disproportionately excluded women without any showing of job-relatedness); *Pietras* v. *Bd. of Fire Comm'rs of Farmingville Fire Dist.*, 180 F.3d 468, 475 (2nd Cir. 1999) (fire department's timed physical agility test that disproportionately excluded women violated Title VII because City failed to prove that the passing score was job-related); *Costa* v.

Markey, 706 F.2d 1, 6 (1st Cir. 1982) (police department's height requirement imposed unjustified disparate impact on women in violation of Title VII); *United States* v. *Virginia*, 620 F.2d 1018, 1024 (4th Cir. 1980) (Virginia State Patrol's height and weight requirement disproportionately excluded women without basis in business necessity in violation of Title VII); *Horace* v. *City of Pontiac*, 624 F.2d 765, 768-69 (6th Cir. 1980) (police department's height requirement imposed unjustified disparate impact in violation of Title VII); *Harless* v. *Duck*, 619 F.2d 611, 616 (6th Cir. 1980) (police department's physical ability test violated Title VII because it disparately impacted women and the City failed to prove that the tested exercises and passing scores were related to the physical requirements of the job); *United States* v. *City of Erie*, 411 F. Supp. 2d 524, 568-70 (W.D. Pa. 2005) (invalidating police department's physical agility test that disproportionately excluded women as neither job-related nor justified by business necessity); *Thomas* v. *City of Evanston*, 610 F. Supp. 422, 432 (N.D. Ill. 1985) (holding that police department had failed to justify its physical agility test that imposed a disparate impact against women); *Berkman* v. *City of New York*, 536 F. Supp. 177, 179 (E.D.N.Y. 1982) (fire department's physical ability test that disparately impacted women violated Title VII because it was not sufficiently job-related).

Disparate impact challenges have played a similarly powerful role in expanding employment opportunities for African-American and Latino male and female firefighters. When Congress amended Title VII in 1972 to include state and local governments as covered employers, it identified race discrimination by fire departments as among the most pressing problems

to be addressed. 118 CONG. REC. 1817 (1972) (describing a series of discriminatory barriers to African-Americans' entry into the firefighting corps). Disparate impact challenges thereafter addressed the elimination of agencies' reliance on certain tests, subjective assignment processes, and other practices that disproportionately excluded African-American and Latino men and women from public safety jobs without any meaningful tether to successful job performance. See, *e.g.*, *Wilmore* v. *City of Wilmington*, 699 F.2d 667, 668 (3rd Cir. 1983) (invalidating assignment and promotional practices that imposed a disparate impact on the basis of race); *Ensley Branch of NAACP* v. *Seibels*, 616 F.2d 812, 822 (5th Cir. 1980) (invalidating examinations for police and firefighter positions that imposed a disparate impact on the basis of race); *United States* v. *City of New York*, 637 F. Supp. 2d 77, 131-132 (E.D.N.Y. 2009) (invalidating fire department's written examinations that had an unjustified disparate impact against African-American and Latino applicants); *Bradley* v. *City of Lynn*, 443 F. Supp. 2d 145, 149 (D. Mass. 2006) (invalidating written civil service examination used by all Massachusetts municipalities that imposed disparate impact against African-Americans and Latinos and was not job related and consistent with business necessity).

This Court and Congress have thus long recognized the important role disparate impact claims play not only in ferreting out subterfuges for an employer's intentional discrimination, but also in ending unjustified practices that deny individuals access to important job opportunities on the basis of race, gender, and national origin without attention to actual merit. Yet the Seventh Circuit's rule frustrates the statutory purposes underlying the disparate impact

provision because it enshrines, rather than ends, those practices that deny job opportunities without any meaningful tether to successful job performance. It instead permits an employer to use a discriminatory non-job-related practice in perpetuity so long as no plaintiff files a charge within 300 days of its adoption.

In this case, for example, the district court concluded that the City had not proven that the test predicted firefighter performance, and that it "was skewed towards one of the least important aspects of the firefighter position at the expense of more important abilities." Pet. App. 30a, 32a. The court also found that the cut-off score distinguishing the "qualified" from "well qualified" pools was "statistically meaningless." *Id.* at 34a. The court further found that less discriminatory yet "equally convenient" alternatives were available. *Id.* at 35a. The City did not appeal the court's findings that its test was discriminatory.

The Seventh Circuit's rule thus immunizes a non-job-related practice – like the City's – that causes disparate impact on the basis of protected class status from subsequent challenge if employees or applicants fail to object to the initial promulgation of the procedure within the brief Title VII limitations period. It thus encourages employers to continue to rely on invalid tests and other practices that entrench longstanding patterns of racial and gender hierarchy at the expense of actual merit.

CONCLUSION

For these reasons, the judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

9to5, National Association of Working Women is a national membership-based organization of low-wage women working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by pay disparities, sex discrimination, the long-term negative effects on economic well-being of these disparities and discrimination, and the difficulties of seeking and achieving redress for all these issues. Our toll-free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and, therefore, our work to promote policies that aid women in their efforts to achieve economic self-sufficiency. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

Founded in 1915, the *American Association of University Professors* ("AAUP") is a non-profit association of over 45,000 faculty members and other academic professionals in all academic disciplines. The AAUP has taken a strong stand against discrimination by institutions of higher education. See, *e.g.*, On Discrimination, POLICY DOCUMENTS & REPORTS 299 (10th ed. 2006). The AAUP has joined amicus briefs in several recent Supreme Court cases addressing the interpretation of anti-discrimination legislation, including *Fitzgerald* v. *Barnstable School Committee* (2009); *Meacham* v. *Knolls Atomic Power*

Lab. (2008); and *Crawford* v. *Metro. Gov't of Nashville & Davidson County* (2008).

The *American Civil Liberties Union* (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty, equality and justice embodied in this nation's Constitution and civil rights laws. The ACLU Women's Rights Project (WRP) was founded in 1972 and since that time has fought to ensure women's full equality in American society, including in the workforce. WRP is dedicated to the advancement of the rights and interests of women, with a particular emphasis on issues affecting low-income women of color and women in non-traditional occupations, such as firefighting. The ACLU Racial Justice Program (RJP) aims to preserve and extend constitutionally guaranteed rights to people who have historically been denied their rights on the basis of race. RJP is committed to addressing the broad spectrum of issues, including employment discrimination, that disproportionately and negatively impact people of color.

The *Anti-Defamation League* ("ADL") was organized more than 96 years ago to advance good will and mutual understanding among Americans of all creeds and races, and to combat anti-Semitism and bigotry of all kinds. To that end, ADL promotes workplaces free of discriminatory intimidation, ridicule, and insult through legal and public advocacy, and also by providing anti-bias training for employers and employees. The League remains vitally interested in ensuring that an employee with a legitimate workplace discrimination claim is afforded the protections long

established under Title VII of the Civil Rights Act of 1964.

The *Asian American Justice Center* (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. The Asian American Justice Center is one of the nation's leading experts on issues of importance to the Asian American community. AAJC and its Affiliates have a longstanding interest in this case to ensure that Title VII protections afford protections to all Americans. This interest has resulted in AAJC's participation in a number of *amicus* briefs before the courts.

The *Asian American Legal Defense and Education Fund* (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The decision below misinterprets the law and undermines the enforcement of Title VII of the Civil Rights Act of 1964.

The *Center for Constitutional Rights* is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in

1966, the Center has litigated numerous civil and human rights cases which have focused on ensuring equal employment and other economic opportunities for people of color and other disadvantaged groups. We currently serve as plaintiffs' counsel in *Gulino* v. *New York City Bd. of Educ.*, 96 Civ. 8414 (S.D.N.Y.), and *Vulcan Society, Inc.* v. *City of New York*, 07-CV-2067 (E.D.N.Y.), two Title VII class action lawsuits which challenge, respectively, racially discriminatory hiring practices for New York City schoolteachers and firefighters.

As a national spokesman and advocate for fathers and stepfathers, *Dads and Daughters* knows how passionately these men want their daughters treated fairly in the workplace, education and the larger society. We recognize how essential is the strong enforcement of Title VII's disparate impact provisions—which have been critical in opening employment opportunities to women and people of color. We know that our daughters will be harmed by the appellate court ruling, because its practical effect is to allow employment discrimination to continue. Such discrimination is not acceptable to any man who imagines his daughter or stepdaughter in the position of being denied opportunity simply because she is female.

The mission of the *D.C. Employment Justice Center* is to secure, protect, and promote workplace justice for low income workers in the Washington D.C. metropolitan area. To that end, EJC provides legal services to over 1500 workers each year through its weekly Workers' Rights Clinics. EJC's clients come to the legal clinic because they do not know their legal

rights in an employment context and/or they do not know how to exercise these rights. Many of EJC's clients are limited English speakers and do not fully understand their employers' policies, much less the employment laws which these policies may violate. Almost a third of the clients who receive services at the clinic report that they have experienced discrimination in the workplace; however, usually this awareness is triggered by direct actions that have been taken against them. A resolution of this case in favor of the plaintiffs would ensure that an EJC client who has suffered discrimination would have an opportunity to seek recourse even if s/he is not aware of the employers' discriminatory policy until it has been exercised against him/her.

Equal Justice Society is a national organization of scholars, advocates and citizens that seek to promote equality and enduring social change, with a primary mission of combating the continuing scourge of racial discrimination and inequality in America. Equal Justice Society has a strong interest in protecting equal employment opportunities, and supports efforts to remove unjust obstacles to achieving this goal. Therefore, Equal Justice Society supports an expansive interpretation of statute of limitation laws in order to ensure that victims of discrimination are afforded adequate time to remedy their wrong.

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country, assisting in employment discrimination and other civil rights cases. It offers training programs, advice and counseling, and amicus representation regarding class

actions and related issues. The Impact Fund is lead counsel in *Dukes* v. *Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2002), and other major civil rights and employment discrimination class action lawsuits.

LatinoJustice PRLDEF is an independent national not-for-profit civil rights organization which has advocated for and defended the constitutional rights and the equal protection of all Latinos under law. Founded in 1972, the organization's mission has been to promote the civic participation of the pan-Latino community, to cultivate Latino community leaders, and to bring impact litigation addressing voting rights, employment opportunity, fair housing, language rights, educational access, immigrants' and migrants' rights. During its 37 year history, LatinoJustice PRLDEF has litigated a number of employment discrimination cases on behalf of Latino and Latina employees.

The *Lawyers' Committee for Civil Rights Under Law* ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been involved in cases before the Court involving the disparate impact claims and the exercise of rights guaranteed by civil rights laws prohibiting employment discrimination.

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for nearly forty years. One priority for Legal Momentum is assuring equal employment opportunity for women in historically male-dominated jobs, such as firefighting, law enforcement, and the construction trades. Legal Momentum advocates in the courts and with federal, state, and local policymakers, as well as with unions and private business, to promote women's access to these jobs by combating sex discrimination. Many policies and practices in male-dominated jobs fall more heavily on women – from outdated physical entrance exams that do not correlate with job duties, to lack of adequate restroom facilities, to light-duty policies that do not accommodate pregnancy. Legal Momentum is fully aware that discrimination against women remains pervasive, and is deeply concerned with ensuring that women may continue to challenge unlawful employment practices under Title VII.

Legal Voice (formerly the Northwest Women's Law Center) is a non-profit organization that works to advance the legal rights of women in the Pacific Northwest through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has been dedicated to protecting and securing equal rights for women and their families, including in the workplace, in educational institutions, and elsewhere. Toward that end, the Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country, including numerous cases establishing women's rights to work free from sex discrimination and sexual harassment. Legal Voice continues to serve as a regional expert and

leading advocate in litigation and in legislative efforts to protect equal opportunity in the workplace.

The *Mexican American Legal Defense and Educational Fund* (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF's mission includes a commitment to ensure equal employment opportunities for Latinos. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. During its 40-year history, MALDEF has litigated numerous employment discrimination cases on behalf of Latino and other minority groups.

The principal objectives of the *National Association for the Advancement of Colored People* (hereinafter "NAACP") are to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights and to inform the public of the adverse effects of racial discrimination. The NAACP, founded in 1909, believes that every individual has a fundamental right to secure a job for which she is qualified without discrimination because of race, color, religion, sex, or national origin. To this end, the NAACP works to ensure the proper judicial construction of civil rights laws, including Title VII.

Established in 1955, the *National Association of Social Workers* (NASW) is the largest association of

professional social workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the NASW Code of Ethics, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. The NASW Code of Ethics directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully" * * * and to "act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of race, ethnicity, national origin, color * * *." NASW policies support "workforce policies that prohibit the negative impact on employees of marginalized racial and ethnic groups." National Association of Social Workers, Racism, Social Work Speaks, 281, 287 (2009).

The *National Campaign to Restore Civil Rights* (NCRCR) is a non-partisan movement working to ensure that our courts protect and preserve equal justice, fairness, and opportunity. We achieve these goals through raising awareness, outreach, and building alliances. NCRCR is comprised of lawyers,

academics, students, and community activists who joined together in response to a series of Supreme Court decisions that raise concerns about civil rights protections. NCRCR draws upon the experience of a cross-cutting range of organizational partners, including many with significant experience working on behalf of people who have faced discrimination on the basis of race, national origin, sex, disability or age, among other characteristics, by employers. NCRCR is interested in ensuring the continued vitality of protections against employment discrimination and in maintaining the ability of employees to challenge employment tests and other employment-related policies that have an unjustified disparate impact.

The *National Education Association* (NEA) is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to opposing employment discrimination and firmly supports the vigorous enforcement of Title VII.

The *National Employment Lawyers Association* advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. It is the country's largest professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 68 state and local affiliates have more than 3,000 members around the

country. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts regarding the proper interpretation and application of Title VII and other anti-discrimination statutes, to ensure that the goals of those statutes are fully realized. Some of the more recent cases before the U.S. Supreme Court in which NELA has participated as *amicus curiae* include: *Gross* v. *FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009); *Crawford* v. *Metropolitan Gov't of Nashville & Davidson County*, 129 S.Ct. 846 (2009); *Sprint/United Management Co.* v. *Mendelsohn*, 128 S.Ct. 1140 (2008); *CBOCS West, Inc.* v. *Humphries*, 128 S.Ct. 1951 (2008); *Kentucky River Retirement Systems* v. *EEOC*, 128 S.Ct. 2361 (2008); *Meacham* v. *Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008); and *Ledbetter* v. *Goodyear Tire Co.*, 127 S. Ct. 2162 (2007).

The *National Immigration Law Center* ("NILC") is a non-profit legal advocacy organization whose mission is to promote and advance the rights of low-income immigrants and their family members. NILC has a national reputation for its expertise in the complex intersection of immigration and employment laws. Since 1990, NILC has litigated key employment discrimination cases, conducted trainings for advocates, attorneys, and government officials on employment discrimination affecting immigrants, and provided technical assistance to hundreds of non-profit agencies representing low-wage immigrant workers. NILC's interest in this case arises out of a concern that

low-wage immigrant workers have access to effective remedies for discrimination in employment.

The *National Organization for Women Foundation* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 550,000 contributing members in more than 450 chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included supporting robust interpretation and enforcement of Title VII so that employment discrimination will truly become a thing of the past.

The *National Senior Citizens Law Center* ("NSCLC") is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 35 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys in legal aid programs. NSCLC's Herbert Semmel Federal Rights Project works to ensure access to the federal courts to enforce safety net and civil rights statutes. As advocates for the elderly and disabled, the equal opportunity protected by anti-discrimination law is critical to our mandate, and NSCLC has participated as counsel in numerous lawsuits on behalf of these populations. NSCLC is profoundly concerned about the impact that the Court's decision may have on its clients' ability to vindicate their equal rights in federal court.

People For the American Way Foundation (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in litigation and other efforts to combat discrimination and is particularly concerned that our nation's anti-discrimination laws be properly interpreted and vigorously enforced. PFAWF joins this brief because the Seventh Circuit's ruling, if not reversed, would seriously undermine the rights of all Americans to a workplace free of unlawful discrimination.

The *Public Justice Center* (PJC) is a non-profit civil rights and anti-poverty legal services organization that seeks to represent the interests of indigent and disadvantaged persons before state and federal appellate courts. Towards that end, the PJC has submitted numerous briefs in the Maryland Court of Appeals and the Court of Appeals for the Fourth Circuit, as well as in other courts, defending the rights of employees to be free from workplace discrimination. See, *e.g.*, *Prince of Peace et al* v. *Linklater*, Sept. Term 2009, No. 66, (Md. filed Aug. 17, 2009); *Haas* v. *Lockheed Martin*, 396 Md. 469 (2007); *Ocheltree* v. *Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003). The PJC has an interest in this case because its outcome will impact the ability of workers throughout the nation to remedy discriminatory behavior by their employers.

The *Sargent Shriver National Center on Poverty Law* (Shriver Center) champions economic opportunity through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. The Shriver Center works on issues related to employment and economic security. Women and minorities make up the majority of low-income people, so discriminatory workplace policies and practices have an especially negative impact on their immediate and long-term economic security. Non-discrimination in employment is the surest path out of poverty and toward economic well-being. Obtaining and maintaining employment in high-wage occupations, particularly in those occupations with a history of discrimination against women and minorities, is of vital importance. The Shriver Center has a strong interest in the eradication of unfair and unjust employment policies and practices, including those that serve as barriers to access to and advancement within family-sustaining employment and economic equity.

Sociologists for Women in Society is an organization of professional sociologists committed to establishing that gender inequality exists in our society and identifying the key mechanisms reproducing this inequality. Many of our members have done research exposing formal and informal practices creating inequality in the workplace, including the degree to which these mechanisms are hidden from the view of most workers.

The Southwest Women's Law Center is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws and constitutional prohibitions on sex discrimination.

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The *Union for Reform Judaism* ("Union") is the congregational arm of the Reform Jewish Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews. Inspired by the biblical teaching that "[y]ou shall not abuse a needy and destitute laborer, whether a fellow Israelite or a stranger in one of the communities of your land"

(Deuteronomy 24:14-15), Reform Judaism has a profound commitment to the principle of equality of opportunity for all persons, including workers. Every working person and the families of workers and society as a whole suffer from discriminatory employment practices. Workers must not be unduly limited in their ability to challenge such discrimination, including through onerous time limits on when such suits may be brought.

The *Vulcan Society, Inc*, is a fraternal, social, and charitable organization of roughly 250 current and former New York City firefighters. For the past forty years, the Vulcan Society has worked to increase the representation of African-Americans and other historically-disadvantaged groups in the New York City Fire Department (FDNY) and the firefighter profession nationwide, through recruitment, training and tutoring of potential minority firefighter candidates and by challenging New York City's longstanding use of racially discriminatory entry-level examinations for the firefighter job. In the early 1970's, the Vulcan Society won a federal civil rights lawsuit challenging the FDNY's entry-level firefighter exam, which resulted in a finding, upheld by the United States Court of Appeals for the Second Circuit, that the FDNY's test violated the Equal Protection Clause of the Fourteenth Amendment. The Court ordered an increase in hiring of minority firefighter candidates for a four-year period. See *Vulcan Society of the New York City Fire Dep't, Inc.* v. *Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973). Earlier this year, the Vulcan Society, acting as a Title VII class action plaintiff, won another liability finding against New York City when the District Court found that the

City's 1999 and 2002 entry-level firefighter exams were racially discriminatory. See *Vulcan Society, Inc.* v. *City of New York*, 07-CV-2067 (E.D.N.Y.)

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly supports Title VII's provision against employment practices that have a disparate impact on the basis of protected class status and that the statute of limitations for this provision is triggered each time an employer applies a practice that causes a disparate impact, instead of an interpretation that would allow employers to indefinitely follow a discriminatory employment practice if they are not stopped within 300 days of the policy's adoption.

The *Women's Law Center of Maryland, Inc.* is a nonprofit membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services, including an Employment Law Hotline, and advocacy, the Women's Law Center seeks to protect women's legal rights and insure gender equality in the workplace.

The *Women's Law Project* (WLP) is a nonprofit public interest legal advocacy organization located in Pennsylvania dedicated to advancing the legal, social, and economic status of women and their families. Since its founding in 1974, the WLP has worked to eliminate sex discrimination in our laws and institutions through litigation, public policy advocacy and individual counseling. WLP has a strong interest in the proper application of civil rights laws protecting women from employment discrimination.

AMICUS CURIAE BRIEF

JAN 2009

No. 08-974

B689

In the

Supreme Court of the United States

ARTHUR L. LEWIS, JR., et al.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the limitations period on a Title VII claim for disparate-impact from an examination and eligibility list created based on examination results starts to run only when the list is adopted and announced, or also later, upon each use of the same list.

2. Whether a plaintiff may bring a Title VII claim alleging that an employer's use of a race neutral written employment examination has an unlawful disparate-impact without a showing of intentional discrimination.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Respondent City of Chicago.[1]

For 35 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF participated as amicus curiae in nearly every major case involving racial classifications heard by this Court over the past three decades, including *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF also participated as amicus curiae in cases before this Court involving the scope and intent of Title VII of the Civil Rights Act of 1964, such as *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(2001); and *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

This case raises important issues of constitutional law and statutory interpretation regarding the length of the limitations period for a disparate-impact lawsuit under Title VII of the Civil Rights Act of 1964. Amicus believes that its public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

Less than a year after this Court's landmark decision in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), holding that an employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability before it can engage in intentional discrimination, this Court is presented with another case revolving around disparate-impact liability. Like in *Ricci*, the results of an objective written test are alleged to violate Title VII of the Civil Rights Act of 1964 (Title VII). Here, however, the issue centers on the length of the limitations period for bringing a disparate-impact lawsuit.

Public policy supports a steadfast limitations period which begins to run for all applicants at the same time. Employers use merit-based testing because it provides objective criteria for determining the best qualified applicants. Employers need to be able to rely on the results of these tests. A limitations period that starts anew each time an employer hires from the applicant pool, provides no security for employers.

Defending and avoiding disparate-impact lawsuits are extremely costly. With the prospect of costly litigation looming over the heads of employers throughout the life of a test, employers will turn to alternative methods to avoid liability, such as racial balancing and racial quotas. Moreover, some employers will choose not to hire minorities for fear of liability or, where possible, choose to move to less minority heavy locations altogether.

Congress has expressed a clear intent for a short filing requirement. A strict limitations period that places all applicants on the same clock encourages optimal enforcement of Title VII. All of the information a plaintiff needs to file a disparate-impact claim—her own results and the overall racial composition of the results—with the Equal Employment Opportunity Commission (EEOC) is known to a test taker at the time she receives the test results. Thus, this Court should affirm the decision of the court below finding that the limitations period on a Title VII disparate-impact claim begins to run from the date of receipt of the test results.

Given the frequency of constitutionally questionable practices and difficulty of implementing objective practices that easily withstand a disparate-impact challenge, this case also provides this Court with an opportunity to simplify the doctrine in this area of the law, consistent with constitutional values, and strike down disparate-impact liability as unconstitutional under the Equal Protection Clause. The congressional enactment of the disparate-impact provisions is fundamentally incompatible with the Constitution's guarantee of equal protection. The

provisions require both employers and the courts to make suspect racial classifications.

The disparate-impact provisions of Title VII also violate the Equal Protection Clause when employers use the statute to make suspect racial classifications. While statistical disparities are inevitable in the workforce, the specter of disparate-impact liability forces employers to use racial classifications, racial balancing, and racial quotas to combat these disparities in order to avoid potentially catastrophic lawsuits. So long as disparate-impact claims remain viable, individuals throughout the country are sure to have their right to equal protection violated again and again. In *Ricci*, Justice Scalia recognized that the Court "merely postpone[d]" the day when the constitutionality of the disparate-impact provisions would be decided. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring). This Court now has another opportunity to right the wrong recognized by Justice Scalia. This Court should strike down disparate-impact liability as a violation of the Equal Protection Clause.

ARGUMENT

I

THE LIMITATIONS PERIOD FOR A TITLE VII DISPARATE-IMPACT CLAIM SHOULD BEGIN TICKING FOR ALL APPLICANTS AT THE SAME TIME

Instead of risking disparate-impact liability, employers faced with a open-ended limitations period are more likely to inject race into their decision-making to arrive at a predetermined racially-balanced work force. Title VII would become incoherent if it consistently results in employers adopting employment

practices solely to create a racial balance. *See Ricci*, 129 S. Ct. at 2675; *see also* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 Cato Sup. Ct. Rev. 53, 83 (arguing that "Title VII's disparate-impact provision, as currently drafted, cannot survive a challenge based on the Equal Protection Clause").

Under Petitioners' argument, however, each selection of an applicant from the list of examination results would restart the limitations period, imposing open-ended liability on employers for their use of merit-based testing. As the Seventh Circuit observed below:

> The plaintiffs received notification of their "qualified" status in 1995; could they ten years later ask to be hired as firefighters and when turned down sue the City for violating Title VII because the reason for not hiring them was that [they] were not in the "well qualified" part of the hiring list? The answer implied by the plaintiffs' argument is "yes."

Lewis v. City of Chicago, 528 F.3d 488, 493 (7th Cir. 2008). Petitioners' approach to Title VII's statute of limitations provides no principled limit to an employers' disparate-impact liability.

A. A Limitations Period That Begins Running for All Applicants Equally Would Bring Title VII's Disparate-Impact Provisions in Line with Its Disparate-Treatment Provisions

To maintain a Title VII lawsuit under a disparate-treatment theory, a plaintiff must file a charge of

discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) ("The charge . . . must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred."). This requirement is akin to a statute of limitations, and failure to file a timely charge of discrimination renders a claim time-barred. *See, e.g., English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987); *Borrero v. Am. Express Bank Ltd.*, 533 F. Supp. 2d 429, 435 (S.D.N.Y. 2008).

This Court has recognized that the ultimate legal issue in a disparate-impact case is the same as in a disparate-treatment case. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). That is, a plaintiff proceeding under either disparate-impact or disparate-treatment must ultimately establish *discrimination*. The *Watson* Court stated that a plaintiff challenging a particular employment practice must go beyond mere statistical disparities and show that the practice "has caused the exclusion of applicants for jobs or promotions *because of their membership in a protected group*." *Id.* at 994 (emphasis added).

Thus, in determining when the limitations period starts to run for disparate-treatment, "'[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful.'" *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (citation and emphasis omitted). "The emphasis is not upon the effects of earlier employment decisions; rather, it 'is [upon] whether any present *violation* exists.'" *Id.* (quoting

United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)).

The alleged racial discrimination in this case, if any, resulted from the test. Here, the City of Chicago (City) had ranked the test takers according to their scores on a written test. *Lewis*, 528 F.3d at 490. All of the test takers learned of their results and the likelihood that they would be allowed to continue with the hiring process based on a notice that the City mailed to each of them. *Id.* Furthermore, even those who received the highest marks on the test were aware that only a third of them would be hired in the next three years. *Id.* Thus, those who were not well-qualified were unlikely to be hired.

The City's ranking and notification of the test results was based solely on the applicants' scores—an applicant's race had no bearing on either the rankings or the mailed notification. Yet, all of the alleged discriminatory action by the City was known by the applicants at this point, namely, that a disproportionate number of black applicants did not receive the highest marks on the test. *Id.* It was also widely known that the selection of test takers for employment would be based on the results of the test on a rolling basis in the foreseeable future. The selection of an applicant, a race-neutral act, could, and was likely to, occur years after the test was administered.

Since the purpose of the disparate-impact provisions of Title VII is the same as the purpose behind its disparate-treatment provisions, the limitations period should begin to run in the same manner—when the alleged discriminatory act became known. When a disparate-impact claim is based on

objective, merit-based testing, the alleged discriminatory act is the statistical racial disparity in the test results. Thus, when the results of test are known by the applicants, the statute of limitations should begin to run.

B. A Limitations Period That Runs for All Applicants Equally Squares with Congressional Intent and Would Encourage Optimal Enforcement of Title VII

The limitations period should begin to run for all applicants equally—when they are notified of their test results. This Court should set clear limits on Title VII disparate-impact liability to avoid and reduce the problems resulting from uncertainty in this area of the law. "Even within the world of Title VII, the social goal should not be the *maximum* enforcement of the antidiscrimination laws but instead their *optimal* enforcement, given both the frequency and severity of errors of overenforcement and underenforcement." Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 225 (1992). Such a rule would encourage the prompt resolution of claims against allegedly discriminatory tests.

By selecting the short EEOC charging deadlines, "'Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.'" *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007) (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980)).[2] Further, "[t]his

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[2] After *Ledbetter*, Congress enacted a statute so that claims (continued...)

short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Id.* at 630-31. The short filing requirement forces prospective plaintiffs to file early, so that the EEOC can begin investigating any alleged discrimination. "[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit"; rather,

> [t]he function of a Title VII charge . . . is to place the EEOC on notice that someone (either a party claiming to be aggrieved or a Commissioner) believes that an employer has violated the title. The EEOC then undertakes an investigation into the complainant's allegations of discrimination. Only if the Commission, on the basis of information collected during its investigation, determines that there is "reasonable cause" to believe that the employer has engaged in an unlawful employment practice, does the matter assume the form of an adversary proceeding.

EEOC v. Shell Oil Co., 466 U.S. 54, 68 (1984).

Employers can only rely on the results of merit-based testing if they know that the limitations period begins running from the time of notification. The act of selecting applicants from a list of testing results is a

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[2] (...continued)
with respect to discrimination in compensation accrue when someone "becomes subject to" or "is affected by application of" a "discriminatory compensation decision or other practice." 42 U.S.C. § 2000e-5(e)(3)(A).

facially race-neutral act. As the Sixth Circuit has recognized, where promotions were made from an eligibility list of test-results arranged in rank order, the eligibility list for promotions "was neutral on its face" and "any discrimination occurred in the compilation of the list." *Cox v. City of Memphis*, 230 F.3d 199, 204 (6th Cir. 2000); *cf. Evans*, 431 U.S. at 558 (finding that a seniority system was "neutral in its operation" because it did not discriminate against former employees or treat former employees discharged for a discriminatory reason differently than those who were not).

This Court has recognized that employers should be able to rely on race-neutral employment practices without fear of disparate-impact liability. This Court has held that, when a seniority system is nondiscriminatory facially and as applied, the allegedly discriminatory adoption of the system triggers the limitations period. *Lorance v. AT & T Techs., Inc.*, 490 U.S. 900, 911 (1989).[3] The *Lorance* Court reasoned that "allowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that § 703(h) [of Title VII,] was meant to protect." *Id.* at 912.

In any statute of limitations, "'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" *Ricks*, 449 U.S. at 259-60 (quoting *Johnson v. Ry. Express*

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[3] After *Lorance*, Congress enacted a statute so that claims of intentional discrimination involving seniority systems accrue when the system is adopted or applied. 42 U.S.C. § 2000e-5(e)(2).

Agency, Inc., 421 U.S. 454, 463-64 (1975)). With Title VII, the limitations periods, "while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions *that are long past*." *Id.* at 256-57 (emphasis added). Title VII's statute of limitations "'represent[s] a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time.'" *Ledbetter*, 550 U.S. at 630 (quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979)). Likewise, employers should not be exposed to open-ended liability for race-neutral acts based on unequal testing results. *See id.*; *Lorance*, 490 U.S. at 912; *Cox*, 230 F.3d at 204.

II

THE COURT SHOULD HOLD THE DISPARATE-IMPACT PROVISIONS OF TITLE VII UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE

Aside from the statute of limitations concerns in disparate-impact cases raised here, disparate-impact liability presents serious constitutional concerns. In *Ricci*, Justice Scalia recognized a significant conflict between "the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 [and] the Constitution's guarantee of equal protection." *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring). Now, less than a year since this Court's landmark decision in *Ricci*, this Court is again presented with an opportunity to invalidate the disparate-impact provisions of Title VII.

Classifications based on race are at the heart of what the Equal Protection Clause was designed to eradicate. *Parents Involved*, 551 U.S. at 730; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 504 (2003). Racial classifications, regardless of whether they are enacted to benefit or burden minority groups, are subjected to strict scrutiny. *Croson*, 488 U.S. at 494. Any watering down of equal protection review will "effectively assure[ ] that race will always be relevant in American life, and that the ultimate goal of eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." *Croson*, 488 U.S. at 495 (citations & quotation marks omitted). Yet, the disparate-impact provisions of Title VII create or permit racial classifications in two distinct ways—first, "in the legislation itself, which would subject the congressional enactment to strict scrutiny; second, in actions taken by public employers to comply with the legislation." Marcus, *supra*, at 62.

A. The Enactment of the Disparate-Impact Provisions of Title VII Violates the Equal Protection Clause

The disparate-impact provisions of Title VII were codified in the Civil Rights Act of 1991. Title VII now reads, in pertinent part:

> An unlawful employment practice based on *disparate impact* is established under this subchapter only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a *disparate impact* on the basis of race, color, religion, sex, or national origin and the

> respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

42 U.S.C. § 2000e-2(k)(1)(A) (emphasis added).

While nothing in the disparate-impact provisions "make[s] use of express racial classifications. . . . [a] plaintiff cannot bring a disparate impact claim without a statistical showing that sorts employees or applicants into groups, and neither the EEOC nor a court can assess a disparate impact claim without deciding whether the classification system the plaintiff used is accurate." Primus, *supra*, at 508. Thus, the statute requires potential plaintiffs, as well as the EEOC and courts, to make explicit racial classifications in order to give the statute effect.

As a consequence of the enactment of the disparate-impact provisions of Title VII, employers and courts necessarily make explicit racial classifications. While the racial classifications are not inherent in the statute, they are a result of the enactment, and they are no more constitutional just because the statute forces third parties to make the classifications. Because the "Federal Government is [directly] prohibited from discriminating on the basis of race, . . . it is also prohibited from enacting laws mandating that third parties . . . discriminate on the basis of race." *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring) (citations omitted). In other words, the enactment of the disparate-impact provisions of Title VII is the impetus of countless impermissible racial classifications, and it must be subjected to the commands of the Equal Protection Clause.

The congressional intent of the disparate-impact provisions also calls into question the constitutionality of those provisions. Congress clearly has the power to legislate to prevent and remedy intentional discrimination. *See* U.S. Const. amend. XIV, § 5; U.S. Const. amend. XIV, § 2. To this end, Title VII was initially enacted as a tool to eliminate intentional employment discrimination. *See Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 93-94 (1981); *Johnson*, 421 U.S. at 459. Yet, the disparate-impact provisions of Title VII do not "smoke out" intentional discrimination since they fail to provide a defense of "good faith" for the employer. *Ricci*, 129 S. Ct. at 2682-83 (Scalia, J. concurring); *see also* Primus, *supra*, at 521-22.

Laws that are enacted with a discriminatory purpose or intent "show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Because disparate-impact is not used as a tool to remedy intentional discrimination, the congressional motives for the enactment of the disparate-impact provisions of Title VII must be called into question.

This Court has consistently decried as "patently unconstitutional," governmental policies designed solely to achieve a racial balance. *See Grutter*, 539 U.S. at 330; *Parents Involved*, 551 U.S. at 723. Yet, "[f]ormer White House counsel Boyden Gray has disclosed that a 'principal motivation' for the Civil Rights Act of 1991, which codified the disparate-impact provision, was to achieve racial balancing." Marcus, *supra*, at 66; *see also* C. Boyden Gray, *The Civil Rights*

Act of 1991: A Symposium: Disparate Impact: History and Consequences, 54 La. L. Rev. 1487, 1491 (1994) ("There were private indications that a desire to codify a quota regime was the principal motivation behind the legislation."). Further, during the enactment debate, Congress recognized that disparate-impact would result in discriminatory mandates being placed on employers.

> Virtually all of the congressional debate that culminated in the Civil Rights Act of 1991 dealt with whether and to what extent the law of "disparate impact" under Title VII encouraged employers to implement quotas or other forms of discrimination in favor of minorities. In the end, Congress codified the judicially-created doctrine of disparate impact with minor modifications.

Nelson Lund, *The Law of Affirmative Action in and After the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 Geo. Mason L. Rev. 87, 88 (1997) (footnote omitted). Since the disparate-impact provisions were enacted with full discriminatory intent, with an eye towards achieving racial balancing in the workforce, they are violative of the Equal Protection Clause and "patently unconstitutional." Because there is no compelling interest in achieving a racially balanced workforce, the enactment of the disparate-impact provisions of Title VII violate the Equal Protection Clause.

B. The Disparate-Impact Provisions of Title VII Require Employers to Violate the Equal Protection Clause

In addition to being an unconstitutional enactment, the disparate-impact provisions of Title VII also violate the Equal Protection Clause by requiring employers to classify persons on the basis of race. Employers who use tests as a component of their hiring or promotion process must ensure that such tests are content-valid and job-related. 42 U.S.C. § 2000e-2(h) (stating that it shall not be an unlawful employment practice "for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin"). Yet, disparate-impact liability has forced employers to resort to racial balancing policies to ensure compliance with Title VII's disparate-impact provisions. Moreover, the fear of liability from disparate-impact suits is causing employers to abandon objective testing altogether.

1. The Fear of Disparate-Impact Lawsuits Causes Employers to Resort to Racial Balancing and Racial Quotas

In trying to prevent an employer's illegal practice from being upheld, disparate-impact claims have led to Title VII liability for legitimate practices that merely have an unequal effect. *See generally* Epstein, *supra*, at 222-25 (discussing overenforcement of Title VII in terms of statistical error). Decades of disparate-impact challenges "have failed to produce tests without disparate impact, which was presumably the larger

original goal." Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 755 (2006).

The use of race-neutral, content-valid, and job-related tests benefits both employers and employees: the employers ascertain the best candidates for the position—those who can demonstrate the skills necessary to succeed in the job; while employees proceed with the application or promotional process confident that their selection or rejection is not based on prohibited factors such as race or sex—but on merit.

The benefits of objective testing are lost if mere statistical disparities in pass/fail rates are sufficient to establish discrimination and generate costly litigation. It is undeniable that disparities exist in the workforce. However, the tendency of certain people to gravitate towards certain jobs does not mean that employers are discriminating. *See Watson*, 487 U.S. at 992 (O'Connor, J., plurality) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance."). Justice O'Connor observed further that, "It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Id.* (O'Connor, J. plurality).

Despite the inevitability of statistical disparities in certain workforces, disparate-impact liability requires employers to be on the lookout for any statistical disparity. Because of the prospect of a catastrophic disparate-impact lawsuit, employers must

take proactive means to remedy what are most likely chance disparities in their workforce. The "inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures." *Id.* (O'Connor, J., plurality).

Because of the threat of disparate-impact liability, "employers are now required to mount the extensive research and preclearance programs necessary to validate a test tailor-made to their own situation," and such "job testing requires heavy expenditures in verification." Epstein, *supra*, at 215. In *Ricci*, this Court noted that the City of New Haven hired a consultant to develop and administer examinations for its firefighter promotional process at a cost of $100,000. *Ricci*, 129 S. Ct. at 2665. But no matter how expensive or well-developed, professionally-developed tests do not protect an employer from a disparate-impact suit. *See Watson*, 487 U.S. at 987.

As a result, "Title VII makes it more costly to employ black workers; it also makes it more costly to fire them because the firm may have to incur the expense of defending a Title VII disparate-treatment suit when a black employee is discharged." Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. Pa. L. Rev. 513, 519 (1987). The threat of disparate-impact in particular "makes it more costly for a firm to operate in an area where the labor pool contains a high percentage of blacks, by enlarging the firm's legal exposure." *Id.* Consequently, Title VII may have the unintended effect of *discouraging* employers from hiring minorities. In *Terry Properties, Inc. v. Standard Oil Co. (Ind.)*, 799 F.2d 1523 (11th Cir. 1986), the defendant sought to build a plant in a location with fewer than 35 percent minority workers "because

it had previously experienced difficulty meeting affirmative action goals in communities with proportionately larger minority populations." *Id.* at 1527.

Worse yet, the excessive threat of disparate-impact claims encourages employers to select applicants based on racial quotas. "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted." *Watson*, 487 U.S. at 993 (plurality opinion). To avoid that result, this Court rejected the argument that race-based employment decisions could be justified by the employer's mere good-faith belief that its actions were necessary to avoid a Title VII disparate-impact lawsuit. *Ricci*, 129 S. Ct. at 2676. This Court recognized that employers would manipulate employment practices to create a "preferred racial balance." *Id.* at 2675 (citing *Watson*, 487 U.S. at 992).

As a consequence of the disparate-impact provisions of Title VII, employers engage in acts that blatantly violate the Equal Protection Clause. "An employer seeking to achieve a particular racial outcome need only identify a racial disparity, locate a selection mechanism that achieves the desired demographic mix, and identify whatever business necessities best justify the mechanism." Marcus, *supra*, at 64.

The focus on statistics is the natural, unconstitutional outgrowth of the disparate-impact provisions of Title VII. By placing the focus on statistics, the disparate-impact provisions of Title VII in turn require employers to adopt quota systems to

ensure compliance and to avoid liability. This Court in *Ricci* held:

> That would amount to a *de facto* quota system, in which a "focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures." Even worse, an employer could discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance. That operational principle could not be justified.

Ricci, 129 S. Ct. at 2675 (citations omitted). This Court has consistently held that quota systems cannot be countenanced under the Equal Protection Clause. Racial quotas "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, 488 U.S. at 507. Under the Equal Protection Clause, racial quotas are an impermissible method of eliminating simple racial imbalance.

2. Continued Sanctioning of the Disparate-Impact Provisions of Title VII Will Lead to a Rejection of Merit-Based Testing

Originally adopted as a response to patronage, nepotism, and other non-merit based methods of choosing employees, merit-based testing has become essential for employers to hire the most qualified candidates for jobs. "For more than a half-century, employers, employment agencies, apprenticeship

committees, and others have used scored tests to assist in making selection decisions for employment opportunities, including hiring, job assignments, training, and promotion." Barbara L. Lindemann et al., 1 *Employment Discrimination Law* 161 (4th ed. 2007) (footnote omitted). As a result, private employers have increased their use of testing in recent years. "[O]verall employment testing, including personality tests, has been growing at a rate of 10% to 15% in each of the past three years" from 2001 to 2004. Rod Kurtz, *Testing, Testing . . .*, Inc., June 1, 2004.[4]

In thirty-four states, state and local government employers are required, *by law*, to use competitive examinations to select applicants for employment opportunities.[5] Indeed, Title VII recognizes that it is

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[4] *Available at* http://www.inc.com/magazine/20040601/managing.html (last visited Jan. 14, 2010). *See also* Susan J. Stabile, *The Use of Personality Tests as a Hiring Tool: Is the Benefit Worth the Cost?*, 4 U. Pa. J. Lab. & Emp. L. 279, 281 (2002) (noting an increase in personality tests since the federal ban on polygraph testing); Nancy Syverson, *Industrial Psychology at Work*, Indus. Maint. & Plant Operation, Apr. 10, 2001, *available at* http://www.impomag.com/scripts/ShowPR.asp?RID=1881&CommonCount=0 (last visited Jan. 14, 2010) (discussing the rise in personality testing).

[5] *See, e.g.*, Ala. Const. art. V, § 138.01(A); Ariz. Rev. Stat. Ann. § 38-1003(4); Ark. Code Ann. §§ 14-49-304(b)(2), 14-50-304(b)(2), 14-51-301(b)(2); Cal. Const. art. VII, § 1(b); Colo. Const. art. XII, § 13(1); Conn. Gen. Stat. §§ 5-195, 7-413; Haw. Rev. Stat. § 76-1; Idaho Code Ann. § 50-1604; 65 Ill. Comp. Stat. 5/10-1-7; Ind. Code §§ 4-15-2-12 to -15; Iowa Code Ann. §§ 341A.8, 400.8, 400.17; Kan. Stat. Ann. §§ 19-4311(a), 75-3746(h); Ky. Rev. Stat. Ann. §§ 67A.270, 90.160, 90.320, 90.350; La. Const. art. X, § 7; Mass. Gen. Laws ch. 31, § 6; Mich. Const. art. XI, § 5; Minn. Stat. §§ 44.06, 387.36(b)(2), 419.06(2), 420.07(2); Mont. Code Ann. §§ 7-

(continued...)

not an unlawful employment practice for an employer to give and act upon the results of any professionally-developed ability test so long as it "is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h).

The use of objective tests, however, does not insulate employers from a disparate-impact lawsuit. This Court has never given employers a "safe-harbor" from disparate-impact liability because they used a particular kind of test. *See Connecticut v. Teal*, 457 U.S. 440, 442 (1982) (rejecting "bottom-line" defense where an employer could avoid disparate-impact liability for a test if the "bottom-line" result of the promotional process was an appropriate racial balance). Nor can employers raise the affirmative defense of "good faith" in response to a disparate-impact claim. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975) (recognizing "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' ") (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)); *but see Ricci*, 129 S. Ct. at 2682-83 (noting that the lack of a good faith defense for disparate-impact liability calls into question the statute's constitutionality) (Scalia, J.

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[5] (...continued)
3-4258, 7-32-4108, 7-32-4111; Neb. Rev. Stat. §§ 19-1829, 23-2525(3), 23-2541(3); Nev. Rev. Stat. § 284.205; N.J. Const. art. VII, § 1, para. 2; N.M. Stat. § 10-9-13; N.Y. Const. art. V, § 6; Ohio Const. art. XV, § 10; 71 Pa. Stat. Ann. § 741.501(a); R.I. Gen. Laws § 36-4-17; S.C. Code Ann. §§ 5-19-20, 5-19-180; S.D. Codified Laws §§ 3-7-9, 3-7-11; Tenn. Code Ann. § 8-30-201(a); Tex. Loc. Gov't Code Ann. §§ 143.021, 143.025; Utah Code Ann. § 10-3-1007; Wash. Rev. Code §§ 41.08.050, 41.12.050(4); Wis. Stat. §§ 63.25(1)(a), 230.15(1); Wyo. Stat. Ann. § 15-5-106(b).

concurring). Rather, "the law, as outlined in the EEOC guidelines, requires an extensive validation of any test with a disproportionate impact." Epstein, *supra*, at 215. This includes showing that the results are applicable to the employer's special circumstances. *See* 29 C.F.R. § 1607.7A.

Under disparate-impact liability, an employer may be held liable for unequal results of testing, even if the employer had no discriminatory intent in selecting and administering the tests. *See Watson*, 487 U.S. at 987 ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."). Still, because of the utility of merit-based tests, employers continue to use them to select the best candidates for jobs. Moreover, Title VII recognizes the need for merit-based testing. 42 U.S.C. § 2000e-2(h).

The end result of requiring employers to focus on the statistical balance of their workforce is employers adopting racial quotas and engaging in racial balancing to avoid potential lawsuits. Even worse, employers are contemplating scrapping objective testing altogether. *See* Steve Bryant, *Police May Scrap Entrance Exam: Report*, NBC Chicago, Jan. 7, 2010.[6] Thus, merit-based testing, a tool recognized by Congress as vital to eliminating discrimination, and seen by businesses as vital to ensuring qualified employees, is threatened by disparate-impact liability. Because disparate-impact liability will continue to

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[6] *Available at* http://www.nbcchicago.com/news/local-beat/chicago-police-scrap-entrance-exam-80790827.html (last visited Jan. 14, 2010).

weaken employers, this Court should take this opportunity to rule on its constitutionality.

Since Congress codified the disparate-impact provisions of Title VII, employers are forced to adopt racial quotas and racial balancing policies to avoid costly litigation. Because the disparate-impact provisions require unconstitutional racial quotas and racial balancing from employers, the disparate-impact provisions of Title VII violate the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, this Court should find the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 unconstitutional. In the alternative, the Court should hold that the statute of limitations for a disparate-impact lawsuit begins to run at the moment the test results are adopted and announced.

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Respectfully submitted,

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